

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case Nos. 08-13555(JMP); 08-01420(JMP)(SIPA)

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In the Matter of:

LEHMAN BROTHERS HOLDINGS INC., et al.

Debtors.

- - - - -x

In the Matter of:

LEHMAN BROTHERS INC.

Debtor.

- - - - -x

United States Bankruptcy Court

One Bowling Green

New York, New York

May 6, 2010

9:33 AM

B E F O R E:

HON. JAMES M. PECK

U.S. BANKRUPTCY JUDGE

VERITEXT REPORTING COMPANY

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516-608-2400

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HEARING re Statement of the Securities Investor Protection Corporation in Support of Trustee's Motion for Relief Pursuant to the Sale Orders or, Alternatively, For Certain Limited Relief Under Rule 60(b)

HEARING re Objection of HWA 555 Owners, LLC to the Motions of Lehman Brothers Holdings Inc., James W. Giddens as Trustee for Lehman Brothers Inc., and the Official Committee of Unsecured Creditors of Lehman Brothers Holdings Inc. to Modify the September 20, 2008 Sale Order and for Other Relief

HEARING re Statement of the Bank of New York Mellon Trust Company in Support of the Motions for (I) an Order Modifying the September 20, 2008 Sale Order and Granting Other Relief and (II) to Unseal Motions for Relief from September 20, 2008 Sale Order (and Related SIPA Sale Order)

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HEARING re Joint Statement And Reservation of Rights of the
Bank Of Tokyo-Mitsubishi UFJ, Ltd. and Lloyds TSB Bank, plc in
Connection with (I) Motions of Lehman Brothers Holdings, Inc.,
The Official Committee Of Unsecured Creditors, And James W.
Giddens, as Trustee For Lehman Brothers, Inc., for Certain
Relief Pursuant to the September 20, 2008 Sale Orders; and (II)
Motion of Barclays Capital Inc. to Enforce the Sale Orders and
Secure Delivery Of Undelivered Assets

HEARING re Australia & New Zealand Banking Group LTD's Letter
Regarding Rule 60 Proceedings

HEARING re LibertyView's: (A) Joinder to (i) the SIPA Trustee's
Motion, (ii) the Committee's Motion; and (iii) LBHI's Motion
for Relief from the Sale Orders or, Alternatively, for Certain
Limited Relief Under Rule 60(b); and (B) Objection to Barclays
Capital Inc.'s Motion to Enforce the Sale Order

HEARING re Joinder of Newport Global Opportunities to
LibertyView's: (A) Joinder to (i) the Trustees' Motion, (ii)
the Committee's Motion; and (iii) LBHI's Motion for Relief from
the Sale Orders or, Alternatively, for Certain Limited Relief
Under Rule 60(b); and (B) Objection to Barclays Capital Inc.'s
Motion to Enforce the Sale Order

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HEARING re Motion of Debtor to Modify the September 20, 2008
Sale Order and Granting Other Relief

HEARING re Motion of the Trustee for Relief Pursuant to the
Sale Orders or, Alternatively, for Certain Limited Relief Under
Rule 60(b)

HEARING re Motion of Official Committee of Unsecured Creditors
of Lehman Brothers Holdings Inc., Authorizing and Approving (a)
Sale of Purchased Assets Free and Clear of Liens and Other
Interests; and (b) Assumption and Assignment of Executory
Contracts and Unexpired Leases, Dated September 20, 2008 (and
Related SIPA Sale Order) and Joinder in Debtors and SIPA
Trustees' Motions for an Order Under Rule 60(b) to Modify Sale
Order

HEARING re Motion of Barclays Capital Inc. to Enforce the Sale
Order and Secure Delivery of All Undelivered Assets

HEARING re Trustee's Adversary Complaint

HEARING re LBHI's Adversary Complaint

Transcribed by: Lisa Bar-Leib

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1 P R O C E E D I N G S

2 THE COURT: Be seated. Good morning.

3 MR. MAGUIRE: Please the Court. Bill Maguire for the
4 SIPC trustee. We call Isaac Montal. Your Honor, may I
5 approach?

6 THE COURT: Yes.

7 (Pause)

8 THE COURT: Good morning. Mr. Montal, please raise
9 your right hand.

10 (Witness duly sworn)

11 THE COURT: Be seated.

12 DIRECT EXAMINATION

13 BY MR. MAGUIRE:

14 Q. Mr. Montal, as you know, I'm Bill Maguire for the SIPC
15 trustee. Can you please tell the Court what is your position
16 at the Depository Trust Clearing Corporation.

17 A. I'm a managing director and deputy general counsel.

18 Q. And does that organization -- did I give the name of your
19 organization correctly?

20 A. I believe you did.

21 Q. Okay. And is that sometimes referred to as DTCC?

22 A. Yes.

23 Q. Can you describe briefly what is DTCC?

24 A. DTCC is a holding company and it has a number of regulated
25 subsidiaries that provide clearance and settlement services for

1 securities transactions processed throughout all of the markets
2 in the United States. We have the DTC subsidiary, provides
3 depository services where we essentially house and keep all of
4 the -- or most of the securities certificates which are traded
5 on the markets in the United States instead of every time
6 there's a transaction that needs to be settled, physical
7 certificates haven't been moved, we do that through book entry
8 transfer on behalf of the participants at DTC. NSCC, which is
9 another one of our regulated subsidiaries, provides the
10 clearance services. And FICC provides similar services in the
11 fixed income area.

12 Q. You referred to DTC as a subsidiary of DTCC.

13 A. Correct.

14 Q. What is the full name of DTC?

15 A. The Depository Trust Company.

16 Q. And what is the full name of NSCC?

17 A. National Securities Clearing Corporation.

18 Q. Can you describe, sir, the relationship that DTC and NSCC
19 had with Lehman prior to its bankruptcy?

20 A. Lehman was a participant of DTC and a member of NSCC.

21 It's essentially the same thing but, for historical reasons,
22 they use different words to describe those. Membership at DTC
23 and NSCC is not open to the public. You have to be a bank or a
24 brokerage firm. And approximately 500 of the larger banks and
25 brokerage firms in the United States are members.

1 Q. And Lehman was one such member or participant.

2 A. Lehman was a member and a participant and had accounts at
3 both of those.

4 Q. And can you describe, sir, DTCC's relationship with
5 Barclays?

6 A. Barclays was in a similar relationship. It also had
7 accounts and was a member of both of those entities.

8 Q. And does Barclays also have a representative on the board
9 of DTCC?

10 A. Yes, they do.

11 Q. And, sir, the Court has heard reference to the term
12 "clearance box", that Lehman had a clearance box at DTCC. Can
13 you please explain what that was?

14 A. That's not actually a phrase that we use or that is common
15 at least in our firm. But our understanding is that people
16 were using it in a sense of the free account. I'm not sure if
17 that's accurate as to how people are using it.

18 Q. And what is a "free account"?

19 A. It's an account at DTC in which the participant keeps its
20 securities, in which the securities that we have on deposit on
21 behalf of that participant are kept.

22 Q. And does DTC have certain rights in assets that are in a
23 participant's free account?

24 A. Yes. To the extent that they are not designated as
25 customer securities or otherwise segregated or pledged, DTC has

1 rights with respect to certain of those securities that are
2 designated each day as NA or net additions. And with respect
3 to those securities, we have -- those actually represent
4 securities that are in the account but have not yet been paid
5 for by that participant. And we have ownership rights with
6 respect to those should the participant default at some time
7 during the day.

8 We also, in general, have a right of indemnity with
9 respect to each participant for any losses that may result as a
10 result of their consistent activity.

11 Q. And with respect to the Lehman assets at DTC, did DTC have
12 rights over certain of those assets as long as those assets
13 remained in the Lehman box free account?

14 A. Yes.

15 Q. In the period leading up to the closing of the sale of
16 Lehman to Barclays, was DTCC concerned about the extent to
17 which Barclays would assume Lehman's liabilities to DTCC?

18 A. We were concerned with Barclays or another participant
19 actually stepping into the shoes of the Lehman account and
20 Lehman's obligations. Lehman, at that point and weeks leading
21 up to the bankruptcy, was in a pretty precarious financial
22 situation. And DTCC, in general, was concerned about the
23 continuing obligations that Lehman had and the ability to meet
24 those obligations on an ongoing basis. The smoothest way to
25 effect a transition of Lehman account to another entity would

1 have been for another entity to come in and step into the shoes
2 of Lehman taking all of its assets and assuming all of its
3 obligations. That is, essentially, what happened in the Bear
4 Stearns situation, for example.

5 Q. In the lead-up to the sale to Barclays, was DTCC also
6 concerned to protect the rights that it had in the Lehman
7 assets at DTCC?

8 A. Absolutely.

9 Q. Over the weekend of September 20 and 21, did you
10 personally participate in various conversations with Barclays
11 concerning Lehman's assets at DTCC?

12 A. Yes.

13 Q. Did your discussions include the subject of what assets
14 Barclays was taking from Lehman as part of that sale?

15 A. Yes. There were many conversations and phone meetings
16 that took place over that weekend about what assets Barclays
17 wanted to take and actually, earlier in that week, whether
18 Barclays would be willing to step into the shoes of Lehman and
19 assume all of its assets and all of its potential liabilities.
20 We were told by Barclays earlier that week that they were
21 unwilling to do that.

22 Q. Ultimately, at the conclusion of all of your discussions,
23 what did Barclays tell you -- what assets did they tell you
24 they were taking as part of the sale of Lehman to Barclays?

25 A. Bottom line, at the end of all of the discussions, we were

1 told they weren't taking anything.

2 Q. And when were you told that by Barclays?

3 A. It was approximately midnight on the night of Sunday,
4 September 21 going into the morning of September 22.

5 Q. And is that the subject of your separate letter agreement
6 between DTCC and Barclays and the trustee?

7 A. The letter agreement was designed to memorialize that
8 understanding.

9 Q. And the purpose of that letter was to protect DTCC and its
10 rights?

11 A. Correct.

12 Q. Now, sir, I'm going to be asking you about a couple of
13 different time frames here. So let me just tell you the
14 different time frames and then we'll get into specific
15 questions. First, I'd like you to explain your role in -- with
16 respect to Lehman for the period starting with the bankruptcy
17 filing of the holding company on Monday, September 15, 2008 up
18 through the end of that week, Friday, September 19. And then
19 through the weekend up to the conference call, the call in
20 which Barclays told you that it wasn't taking anything. And
21 then I'll ask you some questions your letter agreement with
22 Barclays. Is that okay?

23 A. Try to do that.

24 Q. So we'll start with the first time frame and that's
25 starting with Lehman's bankruptcy on September 15. Can you

1 explain your role that week following the bankruptcy filing,
2 what you were doing with respect to Lehman?

3 A. Well, as I said, we were, at that point, very concerned
4 about Lehman's financial situation, its ability to continue as
5 a participant of DTC and a member of NSCC. At that point, we
6 had put Lehman on the highest level of surveillance within our
7 firm. We had already reduced its debit cap or its ability to
8 receive any additional credit from DTC or NSCC. And there was
9 constant consideration about whether or not we should cease to
10 act for Lehman on a going forward basis.

11 Q. You mentioned a debit cap. What is a debit cap?

12 A. Debit cap is really the extent of the amount of credit
13 that DTCC, as an organization, is willing to extend to a
14 member. And it's calculated based on complicated formulas as
15 to how many assets that -- the value of the assets that the
16 participant has on account, past history, lots of other things
17 that go into making that determination.

18 Q. You also mentioned the highest level of surveillance. Can
19 you explain what you meant by that/

20 A. It really means that we are watching very carefully every
21 single trade and keeping close tabs on what that participant is
22 doing to make sure that we, as an entity, are not incurring
23 risk with re -- undue risk with respect to that participant. I
24 may have neglected to say this earlier, but we, at NSCC,
25 guaranty every trade that a participant enters into should that

1 participant default. On the midnight after the trade, at that
2 point, we have guarantied it. So that if Lehman or another
3 participant would fail at any point after that, we, as an
4 entity, would be on the hook and responsible for settling those
5 trades whether it's delivering the securities that they had
6 committed to deliver or paying for securities that they had
7 committed to receive.

8 Q. And were there substantial open trades of Lehman's that
9 had not been settled?

10 A. Yes, there were.

11 Q. And was there concern on the part of DTCC that it had
12 substantial exposure, potentially, in closing those trades?

13 A. Correct.

14 Q. What is a "cease to act"?

15 A. A "cease to act" is a decision that we would make to no
16 longer continue to act for that participant. We would
17 essentially close the account. There'd be no additional trades
18 coming in. The owner of the account, the participant or
19 member, would no longer be able to exercise any rights with
20 respect to that account to effectuate transfers. And unless
21 another participant or member stepped into their shoes, that I
22 explained earlier, to assume all of their assets and
23 liabilities, they would essentially be out of business.

24 Q. And over the period following Lehman's bankruptcy up
25 through the conference call and your agreement with Barclays on

1 the weekend, was DTCC actively considering whether to issue a
2 cease-to-act notice with respect to Lehman?

3 A. We were. Given the situation with Lehman, that was
4 something that was under constant serious consideration.

5 Q. Sir, you should have in front of you a slim black binder.
6 If you wouldn't mind turning to tab 7, it's Movants' Trial
7 Exhibit 450. And this is excerpts from DTCC's annual report
8 for 2008, is that correct, sir?

9 A. Yes.

10 Q. If you could turn, sir, to page 12, you'll see a section
11 with a timeline entitled "Protecting Our Members: The Lehman
12 Bankruptcy".

13 A. I see that.

14 Q. And if you turn, sir, to page 13, there's a section that
15 begins "Nightmare Scenario".

16 A. I see that.

17 Q. And that reads "For" -- and, by the way, there's a color
18 copy, I think, behind the black-and-white copy which might be a
19 little more readable. But that reads: "For DTCC and its
20 subsidiaries, a nightmare was all too possible. After all, as
21 central counterparties, they had guaranteed completion of
22 billions of dollars worth of Lehman's trades. If they incurred
23 substantial losses when winding trades down, they would need to
24 start drawing on clearing funds their customer members
25 maintained with them in the case of defaults. Never in its

1 thirty-five year history had DTCC been forced to do this."

2 Does that nightmare scenario describe, at least in part,
3 DTCC's concerns with respect to its exposure to Lehman?

4 A. Yes.

5 Q. Now, you mentioned the stepping into the shoes that had
6 occurred in the case of Bear Stearns. And that's where
7 JPMorgan Chase assumed all the liabilities of Bear Stearns, is
8 that right?

9 A. Correct.

10 Q. In the case of Lehman, what did DTCC want Barclays to do?

11 A. In the first instance, we discussed with Barclays that
12 they should do the same thing: step into the shoes of Lehman,
13 take all of the assets and assume all of the liabilities. In
14 fact, I believe sometime during that week -- it might have been
15 on Tuesday or Wednesday -- we sent them a set of standard form
16 documentation to swing the accounts from Lehman to Barclays and
17 which would have effectuated in the way that I've described.

18 Q. And did Barclays accept that proposal?

19 A. Barclays did not want to do that.

20 Q. Did Barclays propose instead that DTCC should accepted a
21 limited 250 million dollar guaranty?

22 A. They did.

23 Q. And was that acceptable to DTCC?

24 A. It was not. We felt that, under ordinary circumstances,
25 the guaranties that we had received in the past in similar

1 situations had always been unlimited. We didn't want to accept
2 anything less here. The potential liabilities with respect to
3 Lehman were unknown. And we did not think that 250 million
4 would be sufficient.

5 Q. Sir, if you could turn to tab 2 in your binder. That's
6 Movants' Trial Exhibit 621. And this is an e-mail that you
7 received on or about Friday, September 19 at about 7:46 a.m.
8 from counsel for -- at Barclays. You see that?

9 A. I do.

10 Q. And in that, Barclays' counsel says in the -- I'm sorry.
11 This s -- I misspoke. This is actually from your counsel, Mr.
12 Hirshon, to Barclays' counsel Friday morning.

13 A. Yes, and responding to the -- on the bottom of the
14 e-mail --

15 Q. He's responding to Barclays' e-mail that he's received
16 which is at the bottom of page 7.

17 A. Right.

18 Q. Turning to your counsel's response, he says in the second
19 sentence, "Your proposal must go before DTCC's board and risk
20 management committee which will be done this morning. DTCC's
21 management will recommend rejecting the proposal because of the
22 cap on the guaranty. To be acceptable, the guaranty must be
23 unlimited." And the proposal that he's referring to is the
24 proposal that is set forth at the bottom of the page in the
25 e-mail that was sent to Mr. Hirshon. Is that correct?

1 A. Yes.

2 Q. And that's the proposal that Barclays would provide DTCC
3 with a limited 250 million dollar guaranty.

4 A. Yes.

5 Q. By the time of Friday afternoon, when the parties appeared
6 before this Court at the sale hearing, an agreement had been
7 reached whereby DTCC would get not only a limited 250 million
8 dollar guaranty but also additional collateral, some billions
9 of dollars of residential mortgage-backed securities. And the
10 Court was advised of a modification to that effect. If you
11 could, sir, turn to tab 3 in your binder. It's an excerpt from
12 the transcript of the sale hearing where your counsel addressed
13 the Court on the subject of that modification. And that's at
14 page 52 of the hearing transcript. Starting at line 14, the
15 Court asked, " So this modification principally is for the
16 benefit of your client?" And Mr. Hirshon responded, " Correct.
17 And for the transaction because without it, trading would have
18 stopped. There would be no business to sell because there
19 would have been no -- no trades cleared today. So it was to
20 facilitate the transaction as a friend to the transaction that
21 this was done so that the business continues to operate today.
22 Now, the arrangement is that the whole six billion dollars of
23 residential mortgages will be there and subject to settlement."

24 Sir, did DTC ever value any of those residential mortgage
25 securities?

1 A. No. We never received any details with respect to them,
2 CUSIP numbers, description. We were just told that there would
3 be three billion nominal value in residential mortgage
4 securities that would be available to secure the obligations.

5 Q. Now, let me ask you about what happened in the period
6 after the sale hearing. Did there come a time over the weekend
7 when you learned that the residential mortgage securities
8 collateral was not, in fact, available?

9 A. Yes. That was on Sunday evening.

10 Q. And what were your concerns when you learned that that
11 collateral was not available to protect DTCC?

12 A. Same concerns that we described earlier, which is the risk
13 that the DTCC entities faced with respect to continuing to
14 guaranty the obligations of Lehman for the transactions that
15 were already conducted and which we had guaranteed in the past
16 and which we were obligated to settle should Lehman default.
17 We were being asked to refrain from ceasing to act and closing
18 down the Lehman accounts. And that's not something that we
19 ordinarily would have done in other circumstances. We were
20 trying to facilitate the transaction. But we needed to make
21 sure that the -- our other participants and, in fact, the
22 entire clearance and settlement infrastructure would not be put
23 at risk just for this one transaction.

24 Q. So when you learned that the mortgage securities
25 collateral was not available, what kind of guaranty did DTCC

1 want from Barclays?

2 A. Well, originally, we had -- like I said, we wanted the
3 unlimited guaranty. We reluctantly agreed to the three billion
4 residential mortgages and the 250 million in cash. But at the
5 point where we were on Sunday night in trying to get this
6 transaction done and trying to avoid any further turmoil in the
7 financial markets, we were left with the choice of taking the
8 250 million in cash or ceasing to act. And we made a
9 determination given all of the considerations and all the
10 implications that were involved, to try to get the transaction
11 done and take the 250 million.

12 Q. And when you made that decision, was that based in part on
13 Barclays' representation that it was not taking any of the
14 assets -- the Lehman assets at DTCC in which you had rights?

15 A. Correct.

16 Q. Did DTCC ever tell Barclays that it was prepared to allow
17 Barclays to take all of the Lehman assets without providing
18 DTCC any guaranty beyond that limited 250 million dollars?

19 A. No.

20 Q. Did DTCC ever tell Barclays that its concerns regarding
21 its exposure to Lehman had been in any way alleviated?

22 A. No.

23 Q. At any point over the weekend following the sale hearing,
24 did DTCC ever conclude that its exposure to Lehman trades was
25 substantially less than it had originally thought?

1 A. No. The decision to take the 250 was based upon it
2 essentially being the best deal that we can get, taking into
3 consideration what the consequences would be if the deal would
4 not go forward and what kind of additional turmoil that would
5 cause to the markets and everybody else involved.

6 Q. Over that weekend, did DTCC ever indicate to Barclays that
7 it would release its rights over any assets in Lehman accounts?

8 A. No.

9 Q. Did DTCC ever release its rights over any assets in the
10 Lehman accounts?

11 A. No. We -- ultimately, we closed them out.

12 Q. Now, I'd like to ask you, sir, about the events of Sunday,
13 September 21 and, specifically, about your discussions between
14 Barclays and -- your discussions with Barclays on the subject
15 of what assets Barclays was going to take as part of the sale.
16 Can you tell us, first of all, during the day Sunday, what
17 happened in the various calls that you had with representatives
18 of Barclays concerning what assets Barclays was going to take
19 from the Lehman accounts at DTCC?

20 A. There was a lot of debate during that day about whether
21 there were certain assets and obligations that Barclays might
22 have been willing to assume. They actually had a team that
23 came in very early on Sunday morning, came to DTCC's offices to
24 inspect all of Lehman's books and records which we had made
25 available, and, I guess, do whatever due diligence they wanted

1 to do with respect to those accounts.

2 There were numerous phone calls throughout the afternoon
3 and evening that involved discussions about whether they were
4 going to take certain DTC assets or certain NSCC rights and
5 obligations or assets out of FITC. And there were various
6 iterations that took place along the way about what assets
7 Barclays was interested in taking. A lot of those discussions
8 revolved around the fact that we would not agree to allow the
9 assets to be moved out of these accounts without us being
10 provided with adequate collateral in exchange for those assets.
11 And ultimately, it culminated into discussion at around
12 midnight in which we were told that they weren't taking
13 anything.

14 Q. Now, the discussion at midnight, who led the call from the
15 Barclays side?

16 A. I believe it was Gerard LaRocca.

17 Q. And on the subject of what assets Barclays was taking,
18 what did Barclays tell you?

19 A. On that particular call, they said they weren't taking
20 anything.

21 Q. And was that important to DTCC in terms of protecting your
22 rights?

23 A. Yes. It ensured that the assets would be available in the
24 Lehman accounts to settle the open obligations that existed.

25 Q. How was Barclays' agreement memorialized between DTCC and

1 Barclays?

2 A. There was a letter agreement that was drafted throughout
3 the night and which was signed in the early hours of Monday
4 morning.

5 Q. If you turn, sir, to tab 4 in your binder, this is
6 Barclays' Exhibit number 476. This is an e-mail that you sent
7 to Ed Rosen and others on Monday morning at 3:43 a.m. Is that
8 right, sir?

9 A. Correct.

10 Q. And the subject is "Barclays' Guaranty". And you say,
11 "Attached is a guaranty revised to reflect the agreement
12 reached earlier this evening." To what were you referring,
13 sir, when you said "to reflect the agreement reached earlier
14 this evening"?

15 A. It was that Barclays wasn't taking any assets, that there
16 would be a 250 million dollar cash guaranty and that we would
17 start winding down the accounts of Lehman.

18 Q. Now, sir, if you'd turn, please to tab 5. That's -- I'm
19 sorry. Tab 6. This is an e-mail on which you were copied from
20 one of Barclays' counsel on Monday, September 28, 2008 at
21 around 8 a.m., Movants' Trial Exhibit 633. You see that, sir?

22 A. Yeah.

23 Q. And that's the executed guaranty?

24 A. Yes, it is.

25 Q. If you turn, sir, to the second -- third page of the

1 exhibit, second page of the agreement, there's a section that's
2 entitled "Winding Down of Accounts".

3 (Pause)

4 Q. How long was the process of winding down accounts
5 anticipated to be?

6 A. Well, I'm not sure what you mean. The winding down versus
7 ceasing to act -- it was certainly going to take a number of
8 weeks or longer to liquidate the entire position. But we -- as
9 of Monday morning, we started winding down the accounts. By
10 sometime on Wednesday after Lehman had failed to settle its
11 obligations on Tuesday, we ceased to act.

12 Q. You'll see, sir, the first sentence of this section
13 provides: "Barclays has indicated and hereby agrees that all
14 of the accounts of LBI maintained at the clearing agency's
15 subsidiaries (the "Accounts") constitute the excluded assets
16 within the meaning of the APA. And you understood that the APA
17 was the asset purchase agreement between Lehman and Barclays
18 that defined what assets Barclays was buying and what assets
19 were excluded from the sale.

20 A. Yes.

21 Q. There's a reference to accounts here, sir. Did you
22 understand that to refer to all of Lehman's accounts at DTC?

23 A. At the clearing agency's subsidiaries, right, as defined
24 earlier in this document.

25 Q. And did you understand that to include the contents of

1 those accounts, the assets in the accounts?

2 A. That was our understanding.

3 Q. Now there follows: "Accordingly, pursuant to the
4 authority granted to the trustee", and it describes the
5 trustee's instructions to close out the pending transactions.
6 And if you go to the next paragraph, sir, it says, "As part of
7 this closeout process, the trustee hereby authorizes DTC to
8 accept and act upon instructions from NSCC to deliver
9 securities from the DTC LBI account to NSCC's account in order
10 to reduce or eliminate LBI's outstanding delivery obligations
11 to NSCC."

12 Can you tell us what is the significance or importance to
13 DTC -- or DTCC of that paragraph?

14 A. The outstanding obligations that I described earlier, the
15 transactions that had already been entered into by Lehman
16 existed at NSCC. That's the entity that does the clearance and
17 settlement. The securities to be used to settle those
18 transactions are actually held at DTC, the Depository Trust
19 Company. And typically, we have a standing instruction from
20 each participant to use their DTC positions to satisfy the
21 obligations for the transactions at NSCC. In this case, the
22 trustee accepting and taking control of Lehman. And we wanted
23 to be clear that the assets that existed at the -- at Lehman's
24 DTC account were going to be used to satisfy the open
25 obligations at NSCC. And this paragraph was to memorialize

1 that understanding between the three parties.

2 Q. If you look at the second line of the paragraph, you'll
3 see the words "to deliver securities".

4 A. Right.

5 Q. Those are the assets in the account?

6 A. Yes.

7 Q. And in what account are these securities?

8 A. The DTC LBI account.

9 Q. And who is the owner of those assets?

10 A. Lehman acting through the trustee.

11 Q. At any point in your discussions with Barclays on that
12 conference call in which they agreed that they were not taking
13 anything, did anyone from Barclays say or suggest that, as of
14 Monday morning, any of these securities would be owned by
15 Barclays?

16 A. No.

17 Q. Did at any point anyone from Barclays suggest that you
18 needed authority from Barclays to deliver assets from the box
19 to NSCC?

20 A. No.

21 Q. Did anyone from Barclays suggest to you that there was
22 some distinction in their mind between the accounts and the
23 assets or contents of the accounts?

24 A. No.

25 Q. Did anyone suggest to you that, in Barclays' view, this

1 transaction would enable Barclays to take all of the assets and
2 leave DTCC with an empty box?

3 A. No.

4 Q. Did DTCC ever agree to give up whatever rights it had in
5 Lehman's assets for nothing more than a limited 250 million
6 dollar guaranty?

7 A. No.

8 Q. Now, sir, if you turn to the last page of this exhibit,
9 you'll see the signature of Barclays' representative. That's
10 Mr. LaRocca?

11 A. I believe that's his signature, yes.

12 Q. And was he also a member of the board of DTCC at the time?

13 A. He was.

14 Q. In this case, he's signing this, however, not as a
15 representative of DTCC but as a representative of Barclays
16 Capital Inc.?

17 A. Correct.

18 Q. Now, sir, once you had obtained this agreement with
19 Barclays, what, if anything, did you do to make sure that the
20 clarification letter that the parties to the sale were working
21 on over that weekend was conformed to reflect the details of
22 your letter agreement with Barclays?

23 A. We did nothing. We were not a party to that agreement.
24 We weren't a party to the APA. We didn't believe that we had
25 any obligation or interest as to what was being dealt with

1 within the clarification letter. And, in fact, the reason that
2 we insisted on having this exhibit as a separate document and
3 not be part of a clarification letter or longer document that
4 dealt with the APA was because we had limited interest to make
5 sure that these provisions were in place but did not want to
6 get involved with anything else that might have been negotiated
7 or agreed upon between the parties.

8 Q. And, sir, in acting as a friend to this transaction and in
9 refraining from issuing a cease-to-act on Lehman's business,
10 did DTCC rely on Barclays' agreement that it was not taking any
11 assets from the Lehman accounts at DTCC?

12 A. We relied upon the obligations and terms and conditions in
13 this letter in making that decision.

14 MR. MAGUIRE: Thank you, sir. I have no further
15 questions.

16 THE COURT: Anything from the other movants?

17 MR. TAMBE: Nothing for Lehman --

18 MR. KIRPALANI: Nothing from the committee, Your
19 Honor.

20 THE COURT: Cross-examine?

21 (Pause)

22 MR. SHAW: While they distribute the binders, Your
23 Honor, I'm Jonathan Shaw from the Boies Schiller firm on behalf
24 of Barclays.

25 (Pause)

1 THE COURT: Thank you.

2 CROSS-EXAMINATION

3 BY MR. SHAW:

4 Q. Good morning, Mr. Montal. As I just said, my name is
5 Jonathan Shaw. I'd like to start with what I think will be
6 some fairly uncontroversial propositions and just make sure
7 that we have the same background and understanding.

8 As a practical matter, a broker-dealer in the United
9 States must own a clearing account at the DTC or its
10 subsidiaries to operate, is that right?

11 A. Or clear through somebody else who has an account with us,
12 yes.

13 Q. And most major broker-dealers own their own accounts, is
14 that right?

15 A. Correct.

16 Q. And those accounts may hold securities that are actually
17 owned by the broker-dealer or by its customers.

18 A. Correct.

19 Q. And the individual customers who own the securities in
20 those accounts do not own the accounts themselves, is that
21 correct?

22 A. Correct.

23 Q. And so, there is a distinction between owning a DTC
24 account and owning a security held in that account, correct?

25 A. You can say that.

1 Q. And so, if, for example, Barclays or one of its customers
2 were to sell IBM shares that are resident in Barclays' DTC
3 accounts to either Citibank or one of Citibank's customers,
4 those shares would be transferred by the DTC from the Barclays
5 account to the Citibank account without in any way affecting
6 Barclays' ownership of its DTC account. Is that right?

7 A. That's correct. If we received an instruction from
8 Barclays to transfer securities out of its account, we would do
9 so.

10 Q. And, in fact, every business day, broker-dealers engage in
11 millions of sales of securities held in their DTC accounts
12 without transferring the DTC accounts themselves, right?

13 A. Yes, if you want to draw that distinction.

14 Q. Now, this morning a little earlier, you testified about a
15 conference on the Sunday night before the closing around
16 midnight that resulted in a letter agreement between Barclays,
17 the trustee and the DTC, is that correct?

18 A. Yes.

19 Q. And you testified that that was one of the series of calls
20 between the DTC and Barclays that week, is that right?

21 A. Yes.

22 Q. And the basic issue underlying the discussions throughout
23 that series of calls from the DTC's perspective was that DTC
24 wanted to limit its exposure to the clearing list presented by
25 Lehman's impending demise, is that right?

1 A. Yes.

2 Q. I'd like you, if you would, to turn to the document behind
3 tab number 4 in the binder you were just given. And that is
4 Exhibit 416 which, I believe, has been admitted. Now, you
5 recognize that document, sir, as an e-mail written by DTC's
6 counsel, Mr. Hirshon, to counsel for the creditors' committee
7 last March?

8 A. I see that.

9 Q. Okay. And you understood him to be responding to a
10 request for information from the creditors' committee, is that
11 correct?

12 A. I'm actually not that familiar with this document. So
13 if -- can I --

14 Q. If you'd take a moment to look at the e-mail he's
15 responding to, that would be fine.

16 (Pause)

17 A. Okay.

18 Q. Okay. And so, again, you understand this e-mail to be a
19 response to a request for information that was received from
20 the creditors' committee, is that right?

21 A. Yes.

22 Q. And let's take a look at the first paragraph of that e-
23 mail. That reads: "Working from memory, the gist of your
24 request is for documents that record the deal between Lehman
25 and Barclays. Neither DTCC nor any of its clearing agency

1 subsidiaries (collectively, "DTCC") was a party to that deal,
2 participated in the negotiations or have any documents prepared
3 by either side to demonstrate value as assets to be purchase,
4 et cetera." You see that, sir?

5 A. I do.

6 Q. And do you have any disagreement with what your counsel
7 wrote to the creditors' committee in that paragraph?

8 A. I don't think so. I think he's referring to the
9 residential mortgages, in particular, because I think that's
10 the focus of the inquiry.

11 Q. But you don't take issue with anything he said in that
12 paragraph, right?

13 A. To the extent that it relates to the residential
14 mortgages, I agree with that.

15 Q. Well, are you taking issue with it to the extent that it
16 does not relate to the residential mortgages?

17 A. I just don't think that this was necessarily written with
18 respect to the entire deal. But it's focused on the
19 residential mortgages.

20 Q. Well, you agree that the DTC was not a party to the entire
21 deal, right?

22 A. Correct.

23 Q. And you agree that DTC did not participate in the
24 negotiation of the deal between the Lehman entities and
25 Barclays, right?

1 A. Correct.

2 Q. Okay. And I don't, frankly, really care about the rest of
3 that sentence. So --

4 A. Then we're in agreement.

5 Q. Okay. Now let's look at the third and fourth paragraphs
6 of that letter. Okay. You see that the second sentence of the
7 third paragraph begins with the words "For now"? You see that?

8 A. Yes.

9 Q. Okay. "For now, suffice it to say that each trading day,
10 DTCC and its clearing agency subsidiaries clear and settle
11 nearly all trades done on every exchange in the U.S., about
12 sixty-six million sides a day. Every trade has a buy side and
13 a sell side." You don't have any disagreement with what your
14 counsel wrote in that sentence, do you?

15 A. No.

16 Q. "It guaranties both sides, that is, it guaranties delivery
17 of the securities sold and payment for the securities bought."
18 No disagreement with that sentence?

19 A. No.

20 Q. "If a broker-dealer fails to deliver the securities of the
21 cash, DTCC completes the side and then seeks reimbursement from
22 failing B/D" -- I assume that means broker-dealer?

23 A. I assume that's what he meant.

24 Q. And, again, no disagreement with that sentence?

25 A. Subject to the clarification that when it says that if a

1 broker-dealer fails to deliver, that's in the situation of a
2 default. I'm not talking about -- or I wouldn't agree with
3 this on a day-to-day basis when a broker is supposed to settle
4 a transaction on a T plus three and deliver a hundred shares of
5 IBM and it doesn't deliver it till the next day or the next
6 week, that we actually step in and complete that obligation.
7 We're talking about a default situation.

8 Q. Okay. With that clarification, you don't have any
9 disagreement with what your counsel wrote?

10 A. I do not.

11 Q. Okay. "DTCC monitors its risks daily. In a broker-dealer
12 failure, the DTCC standard procedure is for DTCC to cease to
13 act. It turns off the failing broker-dealer's access to the
14 markets so the DTCC's risk is limited to trades already in the
15 pipeline." No disagreement with any of that?

16 A. No.

17 Q. "In the Lehman deal, the regulators prevailed on DTCC to
18 hold off on its usual procedures in order to facilitate the
19 transfer of LBI's broker-dealer business to Barclays by keeping
20 LBI alive instead of shutting it down." You see that?

21 A. Yes.

22 Q. Do you have any disagreement with that sentence?

23 A. Only in the sense that it was more than just the
24 regulators. I think everybody involved in the transaction was
25 interested in it taking place in that way.

1 Q. Okay. Which regulators were prevailing on DTCC to not
2 cease to act for Lehman Brothers that week?

3 A. As I said, I don't think it was just the regulators. But
4 the conference calls that we were involved in involved every
5 regulator that you can possibly think of, the Fed, the SEC, the
6 Treasury, as well as the parties to the transaction.

7 Q. Okay. And what was your understanding of why the Fed
8 wanted the DTCC to facilitate this transaction?

9 A. I can't speak specifically to the Fed. I can tell you
10 that the general consensus for everybody involved in those
11 meetings was that it was in the best interest of Lehman. It
12 was in the best interest of the financial markets, in general,
13 to have this transaction take place as a going concern.

14 Q. And so that sentiment was expressed by the Fed, by the
15 Treasury, by the SEC, to your recollection?

16 A. Yes.

17 Q. And it was also expressed by Lehman itself?

18 A. Correct.

19 Q. By other constituencies within the broker-dealer or the
20 clearing community?

21 A. I don't know about other constituencies within the broker-
22 dealer community. But I think that Barclays may have been on
23 some of those calls as well.

24 Q. Okay. Let's focus for a moment on the concept of ceasing
25 to act. Fair to say, 'cause I think you've already testified

1 this morning, that was something that the DTC would have
2 preferred to avoid entirely, is that right?

3 A. In this situation, we were trying to avoid that at the
4 request of everybody involved.

5 Q. Certainly in response to the request of all the regulators
6 and all the parties, but also from DTC's own perspective. The
7 best result would be if DTC could get Barclays or some other
8 broker-dealer to take the accounts or take the risk, right?

9 A. Yes.

10 Q. And basically, throughout the week, I mean, your view that
11 that would be the optimal solution didn't change, right?

12 A. Yes. But every day that went by that that did not take
13 place, that risk remained with the DTCC entities. And that was
14 not something that we were comfortable living with on an
15 ongoing basis.

16 Q. And DTC, is it fair to say, was concerned that if, for
17 example, by ceasing to act, it derailed this transaction, that
18 might have consequences for the economy at large, for other
19 participants and the like, right?

20 A. That was one of the considerations, although if we did not
21 cease to act and incurred substantial losses that would flow to
22 our other participants and put the clearance and settlement
23 infrastructure at risk, that would probably have worse
24 implications for the economy at large.

25 Q. Well, it might or it might not, right?

1 A. Correct. But those were the considerations that we were
2 balancing during that week.

3 Q. And you understand that some people have said in
4 connection with this transaction that the alternative to
5 approving this transaction was -- I think the word "Armageddon"
6 has been used.

7 A. I don't know that I've heard that.

8 Q. Well, you understand that people were very, very worried
9 that if the Court did not approve this transaction or if this
10 transaction did not close there could have been substantial
11 harm to the economy and you could have seen other banks failing
12 and the like, right?

13 A. That's correct. And like I've described, the flip side of
14 it as well.

15 Q. And that was why the DTC initially came to Barclays when
16 it understood that Barclays was likely to enter into a
17 transaction to purchase Lehman's assets and ask that Barclays
18 take the LBI accounts at DTC, is that right?

19 A. To the extent that we understood that people were
20 interested in having this sale take place as a going concern,
21 yes, that was something that we were looking for Barclays
22 through them.

23 Q. And Barclays refused to take those accounts, right?

24 A. Barclays did not want to provide an unlimited guaranty and
25 step into the shoes of Lehman.

1 Q. Well, it didn't want to take the accounts and the
2 associated liabilities, right?

3 A. We never spoke about it or thought about it in the context
4 of accounts. We discussed whether or not Barclays would step
5 into the shoes of Lehman, take all of the assets and
6 liabilities and, I guess, presumably take over the accounts as
7 well.

8 Q. And Barclays declined to do that, right?

9 A. Yes.

10 Q. Let's take another look at Mr. Hirshon's e-mail and,
11 specifically, the second paragraph of that e-mail. Now you see
12 it says "As for the resi securities, the original deal was for
13 Barclays to secure DTCC's position with a 250 million dollar
14 guaranty and a pledge of one-half of the six billion dollars of
15 the resis that it was to receive in the deal or three billion
16 dollars as was mentioned at the Friday night hearing. At no
17 time was the deal that DTCC would receive the entire six
18 billion dollars of resis." Do you see that?

19 A. Yes.

20 Q. And that was the deal that was struck on the Friday of the
21 sale hearing, is that right?

22 A. Yes.

23 Q. And documented in the first amendment to the transaction
24 or to the APA?

25 A. I don't know if or where it was documented. We certainly

1 did not enter into any documentation with respect to that.

2 Q. Now, we can go to the fourth paragraph, please. And in
3 that paragraph, Mr. Hirshon writes -- and I'm looking now about
4 the middle of the paragraph: "The idea, as expressed at the
5 hearing, was to deliver the broker-dealer intact and as a going
6 business. The 250 million dollar Barclays guaranty and the
7 resis were to be provided to protect DTCC from any losses it
8 would incur as a result of not ceasing to act for LBI." Is
9 that an acc -- do you accept what your lawyer has to say there?

10 A. I think the 250 million guaranty was there to protect DTCC
11 from any losses relating to the Lehman account. I wouldn't
12 limit it by saying from any losses it would incur as a result
13 of not ceasing to act. The terms of the 250 million guaranty
14 are described in the DTC letter that we described earlier.

15 Q. Sir, you remember you were deposed in this action --

16 A. Yes.

17 Q. -- back in February?

18 A. Yes.

19 Q. And you'll see behind tab number 1 of your binder, there's
20 a copy of the transcript of your deposition. And I'd ask you
21 to turn to page 96 of your deposition transcript, sir. And I
22 would direct your attention to the question beginning on line
23 15 which I'm not going to read back in its entirety because it
24 largely consists of reading the fourth paragraph of Exhibit
25 416, that exhibit from Mr. Hirshon.

1 A. Okay. And you were asked, "Do you see that?" And your
2 answer was "I do." And then you were asked, "Is there any part
3 of what Mr. Hirshon says that you disagree with?" Do you see
4 that?

5 A. Yes.

6 Q. Okay. And your response was "I'm not sure if I would have
7 characterized it as only the regulators prevailed on DTCC to
8 hold off on its usual procedures, et cetera. But I believe it
9 was the regulators as well as all the parties involved were
10 interested and had a strong desire to transfer LBI's broker-
11 dealer business to Barclays as a going business. Other than
12 that, I have no disagreement with anything in that paragraph
13 you read."

14 Was that your answer at the time, sir?

15 A. That was. But I probably realize now that I should have
16 read the paragraph a little more carefully.

17 Q. Now, over the weekend -- you can put the deposition aside
18 now, sir. Over the weekend, everyone learned that the resis
19 were unavailable, is that right?

20 A. Yes, late on Sunday.

21 Q. So the DTC returned to its request that Barclays take the
22 accounts or take the risk by providing full guaranty, right?

23 A. That was probably discussed very briefly. But I think it
24 was pretty clear to us from the discussions earlier in the week
25 that that wasn't going to happen.

1 Q. Well, there are efforts made to try to get Barclays
2 comfortable enough with the level of risk that it might be
3 willing to take the accounts or take the risk with a full
4 guaranty, isn't that right?

5 A. I don't know anything about that.

6 Q. Well, there was -- DTC made Lehman's books, as you
7 testified this morning, and records relating to these accounts
8 available to Barclays for due diligence teams to inspect,
9 right?

10 A. That was at Barclays' request to come in and look at the
11 books. That was not at DTC's request for Barclays to become
12 comfortable to give us an unlimited guaranty.

13 Q. But ultimately, at the end of the day, Barclays refused to
14 take the accounts, right?

15 A. Barclays refused to give us the unlimited guaranty and
16 told us they weren't going to take anything.

17 Q. And they told you they weren't going to take the accounts,
18 right?

19 A. They didn't say accounts. They said they weren't going to
20 take anything. I don't know if you're trying to draw that
21 distinction or not. I know that's become an issue in this
22 case. So I'm trying to be careful about how I answer the
23 question.

24 Q. Well, Barclays refused to take any -- the risk by
25 providing an unlimited guaranty, right?

1 A. Yes.

2 Q. Okay. And Barclays refused to take the accounts, right?

3 A. Yes.

4 Q. And as we've just mentioned, during this time, DTC was
5 under a great deal of pressure or was subject to a great deal
6 of persuasion not to block this transaction, right?

7 A. I think we discussed earlier that everybody was interested
8 in having the deal proceed as a going concern.

9 Q. Okay. Was there any discussion at DTC about the fact that
10 DTC did not want to be blamed for blocking or causing this
11 transaction to fail?

12 A. I need to assert attorney/client privilege with respect to
13 any internal DTC discussion that I was part of.

14 (Pause)

15 Q. Sir --

16 MR. SHAW: Your Honor, we really ought to be able -- I
17 believe this man is the DTC 30(b)(6) representative. And we
18 think we're entitled to inquire into what the DTC knew and
19 considered as it made these decisions.

20 THE COURT: Well, you may be. I assume that questions
21 were asked during his deposition that may have gotten close to
22 the attorney/client privilege or may have resulted in a claim
23 of attorney/client privilege. The witness has been asked a
24 question about something that he's refusing to answer on the
25 grounds of privilege. You can certainly ask him questions to

1 his knowledge that do not impinge on the privilege. You're
2 free to ask other questions. Just have to ask the right ones.

3 MR. SHAW: Okay.

4 Q. Sir, are you aware of any discussions between non-lawyers
5 at the DTC -- and by "non-lawyers", I mean people not operating
6 in a legal capacity as opposed to people without a law degree
7 since there may be a difference -- about whether DTC was
8 concerned that it might be blamed for blocking this deal or
9 causing it to fail?

10 A. No.

11 Q. Do you know whether any such discussions -- do you know
12 whether that was a consideration that DTC took into account in
13 reaching the decisions that it did?

14 A. Any knowledge I would have to answer that question would
15 be based upon attorney/client privilege.

16 (Pause)

17 Q. Did you yourself believe that there was a risk that DTC
18 would be blamed for causing this deal to fail?

19 A. Any knowledge I would have with respect to that issue
20 would be based upon privileged conversations and information.

21 Q. No. Sir, I don't think so. I didn't ask if anyone told
22 you that. I asked if you yourself believed that there was a
23 risk that DTC would be blamed if this deal did not go forward.

24 A. I still think that any information I have to answer that
25 question would be information that I would have received in an

1 attorney/client capacity. And beyond that, I don't know that I
2 would have an opinion one way or another.

3 Q. Okay. And again, I'm not asking you what anybody told
4 you. I'm asking you as someone who participated in these
5 events whether it crossed your mind at any point that weekend
6 that DTC would be blamed -- ran the risk of being blamed if
7 this deal did not go forward because the DTC interposed itself
8 in some way.

9 A. Are you asking me to put aside any information I have with
10 respect to attorney/client information and then answer the
11 question?

12 Q. No. I'm asking you, sir, to tell me what you yourself
13 were thinking that weekend.

14 A. I don't know that I thought about that aspect of it.

15 Q. So if I understand your response correctly, you're saying
16 that the thought that DTC -- that you're saying that you are
17 not sure, as you sit here today, whether the thought that DTC
18 might be blamed crossed your mind over the course of that
19 weekend.

20 A. Sitting here today, I don't have a specific recollection
21 of thinking about that over that weekend.

22 Q. And let me ask again, is it your understanding, sir, that
23 that was a concern for the DTC that weekend?

24 A. Any information I would have to answer that question would
25 be based upon privileged conversations or information.

1 Q. Okay. Well, you understand that you were designated as
2 the DTC's 30(b)(6) witness, correct?

3 A. Yes.

4 Q. And you conducted an investigation to find DTC's best
5 testimony on issues relating to this transaction, right?

6 A. Yes.

7 Q. Okay. And that was with the intent of offering testimony
8 in the DTC's behalf, sir, right?

9 A. Yes.

10 Q. And based on your investigation to prepare yourself to
11 become a 30(b)(6) witness on behalf of the DTC, did you learn
12 that the DTC was concerned about the risk that it would be
13 blamed if this transaction cratered as a result of the DTC's
14 actions?

15 A. I did not learn about any non-privileged conversation or
16 information in connection with that. And if there was a non-
17 lawyer sitting up here on behalf of DTC, I think you'd get the
18 same response.

19 Q. How about prior to the weekend? Did DTC have that concern
20 at any point prior to the weekend?

21 A. I don't know -- let me answer the question this way which
22 is that we participated in many conversations in which
23 everybody expressed the importance of trying to get this deal
24 done as a going concern. There was no discussion about blame.

25 Q. And is that prior to the weekend you're answering with

1 respect to?

2 A. Yes.

3 Q. Did you participate in any conversation where there was a
4 discussion about blame over the weekend?

5 A. I don't know that we used those words.

6 Q. All right. I'm not concerned about the words at the
7 moment, sir. What I'd like to know is whether there was a
8 discussion which, in sum or substance, was a concern that the
9 DTC would be blamed if this deal cratered due to the DTC's
10 actions.

11 A. Any conversation that might have taken place about that
12 was with the lawyers and would be privileged.

13 Q. Did you have any knowledge, or did DTC have any knowledge
14 or concern, about potential blame?

15 A. Can you repeat that?

16 Q. Sure. Let me rephrase that actually. In the
17 conversations that DTC had with the regulators who we discussed
18 earlier or with other market participants, did anyone express
19 the view that it would be -- that DTC would be blamed for
20 causing this transaction to crater and all of the consequences
21 that would result therefrom if it did not go forward with it?

22 A. Not in those terms. It was expressed as the importance of
23 getting the transaction done as a going concern.

24 Q. Okay. Without giving me the content of any privileged
25 communication concerning whether DTC was concerned that it

1 would be blamed, sir, if there were any such discussions, tell
2 me who was present for those discussions: lawyers, nonlawyers.
3 What I'm asking for, sir, is I want to find out the basis for
4 the assertion of privilege.

5 A. All the internal discussions that happened that weekend
6 were with the presence of counsel, myself, Larry Thompson,
7 who's the general counsel. At times there were other lawyers,
8 in-house lawyers as well as Mr. Hirshon from Proskauer and some
9 businesspeople.

10 Q. And who were the nonlawyers who were present for those
11 discussions?

12 MR. MASHBERG: Your Honor, Gregg Mashberg. I
13 represent DTCC and I'm just concerned some of these privileged
14 questions --

15 THE COURT: Why don't you come forward and identify
16 yourself so that the transcript at least reflects who you are
17 and can pick up your words.

18 MR. MASHBERG: Forgive me for interrupting the
19 examination, Your Honor. My name is Gregg Mashberg from
20 Proskauer Rose. I represent DTCC and Mr. Montal. And I'm
21 concerned, although Mr. Montal has been handling himself, I'm
22 concerned we're at a point now where the implications of his
23 question is going to perhaps reveal privileged information.
24 And if the question were asked, in general, who were the
25 businesspeople who were involved in the discussions overall, I

1 don't think there's any privileged implications to that. But
2 if we're going to be asking questions hypothetically if there
3 was such a conversation who would be the businesspeople who
4 would be involved, I think that that is getting very close to
5 disclosing whether or not there was privileged communication.

6 THE COURT: I understand your concern. Why don't you
7 sit down in front of the bar just in case you want to hop up
8 again conveniently at some point during the rest of this
9 examination? I don't believe that the question which has been
10 asked that prompted your interruption gets to the question of
11 the substance of any communications between the various lawyers
12 who have been identified and the as yet unidentified
13 businesspeople. All that Mr. Shaw, I believe, is asking at
14 this point is who were the businesspeople who were involved
15 during the weekend when conversations took place that may
16 involve privileged communications. If the question is asked in
17 the way I've just stated it, is that a source of concern for
18 you?

19 MR. MASHBERG: So long as the question is broad and
20 doesn't imply that there was such a communication 'cause I do
21 believe if the fact of whether or not that specific subject was
22 discussed would implicate privileged information. I think a
23 general question like that is okay. But it just can't imply or
24 assume that there was such a conversation.

25 THE COURT: I think all that we're doing at this point

1 is determining who was present. And let's proceed on that
2 basis. And what happens next, we'll see what happens.

3 BY MR. SHAW:

4 Q. I take it, sir, that you have in mind specific discussions
5 that you are asserting a privilege. And all I'm trying to do,
6 as His Honor pointed out, is find out who the businesspeople
7 who were involved in those discussions were.

8 A. I think I started to answer that all of the discussions
9 and meetings that weekend were with the lawyers and the
10 businesspeople. And I think I've identified some of the
11 lawyers for you. And amongst the businesspeople who were
12 involved were Don Donahue, Mike Bodson, Tom Costa, Susan
13 Cosgrove. There were probably others whom I'm not remembering.

14 Q. And when you say there were probably others whom you're
15 not remembering, are you referring to exclusively employees of
16 the DTC?

17 A. Yes.

18 Q. And when did these discussions that you have in mind take
19 place, sir?

20 A. I said the entire weekend.

21 Q. And where did these discussions take place?

22 A. At 55 Water Street.

23 Q. And the general subject matter of these discussion was
24 whether the DTC should go forward with this trans -- should
25 cease to act or not cease to act on certain terms, is that

1 correct?

2 A. The general subject of the discussions that weekend were
3 the Lehman situation and various aspects of it.

4 Q. And just so I'm clear, sir, are you claiming privilege
5 with respect to all internal DTC conversations that weekend?

6 A. Yes, to the extent that the lawyers were present.

7 Q. And that's true whether or not the issue was the business
8 decision that DTC was going to make or a request for legal
9 advise. Is that your position, sir?

10 A. I think that the -- there were no business decisions that
11 didn't implicate legal issues. I think all of the decisions
12 that we were making had legal aspects to them and business
13 aspects to them.

14 Q. And so you're, as I understand it, taking the position,
15 that the subject of DTC's deliberations is a closed book under
16 the privilege. Is that correct, sir?

17 A. My position is that to the extent that we had
18 conversations with outside parties and had discussions with
19 them, there's certainly no privilege with respect to that. And
20 I'm happy to answer any questions relating to that. But with
21 respect to internal discussions in which the lawyers were
22 involved, I think that's privileged.

23 Q. Now, sir, you testified extensively on direct examination
24 about what you understood DTC to have wanted, right?

25 A. Yes, which we conveyed to Barclays and which we conveyed

1 to the other parties involved.

2 Q. Okay. And the source of your information about what DTC
3 wanted is these conversations that we're talking about, right?

4 A. Like I said, I'm happy to answer conversations -- to
5 answer questions and provide information with respect to
6 conversations that we had with third parties. And that's what
7 the basis of my answers were.

8 Q. No, sir. I'm not talking about conversations with third
9 parties. I'm talking about when you were asked what did DTC
10 want, what was DTC concerned about, et cetera, that was based
11 on the information that you gleaned during these conversations
12 that you're now saying to me are privileged, right?

13 A. All of that was conveyed to Barclays, Lehman and the
14 regulators in the discussions that I described in my testimony.

15 MR. SHAW: Your Honor, we would ask that the witness
16 be directed to respond to the questions that I'm asking about
17 these conversations at DTC.

18 THE COURT: Why on earth is this relevant? Why are
19 you even concerned about it? I've been listening to this for
20 the last twenty minutes and I don't get it.

21 MR. SHAW: Your Honor, the point that I'm trying to
22 make is that DTC had very strong motivations to proceed with
23 the deal on the terms actually offered by Barclays which was
24 250 million dollars. That would have overridden --

25 THE COURT: I'm reminded of an objection that was made

1 yesterday by Mr. Boies concerning unexpressed subjective
2 intent. I don't care --

3 MR. SHAW: Then I will move on, Your Honor.

4 THE COURT: -- about what was going on within the
5 halls of 55 Water Street. I only care what was said and what
6 people did. And that's all you should care about.

7 MR. SHAW: Then I will move on, Your Honor.

8 THE COURT: Please do.

9 (Pause)

10 BY MR. SHAW:

11 Q. Let's look back at Mr. Hirshon's e-mail, sir,
12 specifically, the last sentence of the fourth paragraph. That
13 reads, "As I said, the resis were pulled from the deal leaving
14 only the Barclays guaranty. And after an internal review of
15 the situation, DTCC accepted the revised deal." You see that,
16 sir?

17 A. Yes.

18 Q. Okay. And that statement by your counsel is one that you
19 would accept as correct, right?

20 A. Yes.

21 Q. And just so we're clear, what you understand to be the
22 revised deal, is the deal set forth in the DTCC letter, right?

23 A. Yes.

24 MR. SHAW: Your Honor, this might be, if the Court
25 wishes, an opportune time to take a -- the morning recess.

1 THE COURT: Be happy to take a recess. We'll break
2 for fifteen minutes.

3 (Recess from 10:52 a.m. until 11:17 a.m.)

4 THE COURT: Be seated.

5 RESUME CROSS-EXAMINATION

6 BY MR. SHAW:

7 Q. Mr. Montal, we talked earlier today about many calls that
8 took place between Thursday and Sunday with Barclays, is that
9 right?

10 A. Yes.

11 Q. Okay. How many calls were there, sir?

12 A. I don't know how many.

13 Q. Were there any in-person meetings with Barclays to discuss
14 these issues?

15 A. I don't believe so.

16 Q. And when was the first call? Thursday?

17 A. There are certain calls that I have specific recollections
18 about. There were a lot of events that were taking place
19 during that week and weekend. And I could not tell you if the
20 first one was on Thursday or Wednesday or Tuesday. I really
21 don't have a specific recollection about that.

22 Q. Well, how many calls do you have a specific recollection
23 about, sir?

24 A. Most clearly, probably around three of them on Sunday
25 evening.

1 Q. Okay. And of the total number of calls that there were,
2 those three would be about, what, half? Ten percent? What?

3 A. I wouldn't want to guess. I have no idea.

4 Q. Can you tell me when the three calls that you have any
5 specific recollection about took place on Sunday?

6 A. Specifically, on Sunday evening in the discussions about
7 what Lehman -- what Barclays was going to take or not going to
8 take.

9 Q. No, sir. Just unclear. I just want to know the times.
10 Can you tell me when those three calls took place on Sunday.

11 A. Sunday evening.

12 Q. And can you give me approximately the time of the first
13 call?

14 A. No.

15 Q. Can you give me approximately the time of the second call?

16 A. No.

17 Q. And how about the third call?

18 A. That was around midnight.

19 Q. Okay. Can you tell me who was on the first call for the
20 DTCC?

21 A. I believe it would have been myself, Larry Thompson, Don
22 Donahue, Tom Costa, maybe Mike Bodson. And I don't remember if
23 there were others.

24 Q. Okay. And can you tell me who was on the call from
25 Barclays?

1 A. Excuse me. I left off Shelly Hirshon. Sorry about that.

2 Q. Can you tell me who was on the call from Barclays, sir?

3 A. I know that Gerard LaRocca was on that call. And he had a
4 bunch of other folks with him. I don't remember specifically
5 who they were.

6 Q. Okay. Do you recall whether you spoke at all on that
7 call?

8 A. I don't.

9 Q. How about Mr. Thompson? Do you recall him speaking on
10 that call?

11 A. I don't specifically remember him saying something or not
12 saying something.

13 Q. Okay. What about Mr. Donahue or Donahoe. I'm sorry.
14 I --

15 A. Yes. I'm sure he spoke.

16 Q. Do you recall anything specific that he said during that
17 call?

18 A. It was a discussion around what Barclays was going to take
19 or not going to take.

20 Q. Okay. Do you remember anything that he specifically said,
21 however, during that call?

22 A. If you're asking me to repeat the words that he spoke, I
23 cannot.

24 Q. Okay. Can you remember --

25 MR. SHAW: Strike that.

1 Q. Mr. Costa -- do you remember anything that he said during
2 that call?

3 A. Not spe -- if you're asking me to repeat the words he
4 said, no, I could not do that.

5 Q. Can you tell me anything that Mr. Bodson said during that
6 call?

7 A. Same answer.

8 Q. Okay. And Mr. Hirshon? Anything that he said that you
9 can recall?

10 A. No.

11 Q. Okay. Can you tell me anything specifically that Mr.
12 LaRocca said during that call?

13 A. I can tell you the sum and substance of the conversation
14 on both sides. I can't tell you, with respect to that first
15 call, the specific words that people spoke.

16 Q. Okay. Can you recall what anybody said on that call who
17 spoke?

18 A. I do remember one specific colloquy in which there was --
19 I believe it was Mr. LaRocca who said that they wanted to take
20 certain assets. And he was interrupted by somebody else on the
21 Barclays side who said no, no, no. We're not taking that. And
22 there was some back and forth about that.

23 Q. Do you --

24 A. I do remember that specific exchange on the phone.

25 Q. Okay. And that was an exchange entirely within the

1 Barclays side, is that correct?

2 A. With us on the phone.

3 Q. And do you know what specific asset that was?

4 A. I don't.

5 Q. Was anyone other than a representative of the DTC or
6 Barclays on that call?

7 A. Not that I remember, no.

8 Q. Okay. Did the trustee or any representative of the
9 trustee participate in any of these three calls?

10 A. I don't think so.

11 Q. Did anyone from Lehman participate in any of these three
12 calls?

13 A. I don't think so.

14 Q. All right. Moving on to the second call, do you recall --
15 can you tell me who was on that call?

16 A. It was myself, Shelly Hirshon and a representative of
17 Barclays whose name I don't remember.

18 Q. And can you remember anything that was said by any of
19 those people on that call?

20 A. It was a discussion and a request from the individual from
21 Barclays to take certain specific fixed income assets.

22 Q. Can you tell me which fixed income assets in particular?

23 A. I believe it was the book of TBAs.

24 Q. Anything else you can recall being discussed on that
25 particular call?

1 A. That was the sum and substance and focus of that call.

2 Q. All right. Now, the third call, the one around midnight,
3 who was on that call, sir?

4 A. Mr. LaRocca, other people from Barclays whose names I
5 don't remember, Don Donahue, Larry Thompson, myself, Mr.
6 Hirshon, Tom Costa and there may have been others in the room.
7 I don't remember.

8 Q. Did the trustee or any representative of Lehman
9 participate in any of the calls prior to the three we've been
10 discussing in the last couple of minutes.

11 A. They certainly participated in calls on -- prior to the
12 weekend, there were certain calls with them with respect to the
13 entire transaction, yes.

14 Q. Okay. But on the weekend, you don't believe that anyone
15 from the trustee or from Lehman participated in any of the
16 calls?

17 A. There were probably calls earlier in the day in which
18 Lehman participated that related to whether or not JPMorgan
19 Chase was going to continue as a settling bank for the Lehman
20 entities. There were a couple of other calls that day that
21 didn't focus on what assets Barclays was taking but were
22 focused on some other things related to the Lehman situation in
23 which Lehman, I believe, or its representatives participated.

24 Q. And just so I'm clear on what you're saying, if I
25 understand you correctly, no representative of Lehman or the

1 trustee participated in any discussions concerning what assets
2 Barclays was taking, is that right?

3 A. Not that I remember.

4 Q. Now, you've testified, sir, that you recall somebody
5 saying we're not taking anything. Is that right?

6 A. Yes. I believe I said that was Mr. LaRocca.

7 Q. Now, sir, turn to your deposition, page 119, please. And
8 if you'll begin at line 16, you were asked, "Referring back to
9 the Sunday night/Monday morning conversation, who from Barclays
10 made a statement during that conversation concerning Barclays
11 not taking anything? Mr. Maguire asked you a number of
12 questions about somebody saying that Barclays is not taking
13 anything. And what I'd like to know is who specifically used
14 those words and what did they say." And then there's a bit of
15 colloquy that I think takes us over onto the next page. And
16 your response was, "I can't remember with certainty who said
17 that."

18 Was your testimony truthful and accurate at that time,
19 sir?

20 A. Yes, it was.

21 Q. So are you now more certain that Mr. LaRocca was the
22 person who said that?

23 A. Yes.

24 Q. And what is the basis for your additional certainty, sir?

25 A. I thought about it some more. I prepared for this

1 testimony.

2 Q. Well, you prepared for your deposition testimony as a
3 30(b)(6) witness, hadn't you?

4 A. I had.

5 Q. Have you subsequently reviewed an additional document or
6 had a conversation with someone to refresh your recollection?

7 A. I spoke with my lawyers.

8 Q. And did your lawyers remind you that they thought Mr.
9 LaRocca had spoken?

10 A. I don't think it was my lawyers reminding me but in the
11 context of preparing for the deposition, I went through the
12 events of that evening and I now believe that it was Mr.
13 LaRocca who said that.

14 Q. Now, was Mr. LaRocca's statement a response to some
15 particular statement by someone else?

16 A. It was probably in response to the open question that we
17 were dealing with throughout the course of that evening, which
18 was what assets, if any, was Barclays taking and what
19 collateral would be made available to the DTCC entities to
20 secure it against any attendant risk.

21 Q. If I understand your response correctly, that's what you
22 think might have happened, but you don't have a recollection
23 one way or the other specifically, right?

24 A. No. I -- if you're asking me did the conver -- who
25 started the conversation, who started by saying hello and who

1 answered, I couldn't answer that question. But I -- the
2 conversation specifically was to try to reach resolution on
3 what assets Barclays was taking and what collateral DTCC was
4 getting.

5 Q. What did you do to prepare for your testimony today, sir?

6 A. I met with my counsel and I've reviewed documents.

7 Q. And how long did you meet with your counsel, sir?

8 A. A couple of days.

9 Q. Full days?

10 A. They spanned a full day, but there were lots of
11 interruptions.

12 A. Take a look at tab 2 of your binder, sir, which is a copy
13 of the DTC letter, BCI number 6, sir. And I'd like to direct
14 your attention to the second page of that document, in the
15 paragraph numbered 1, and headed "Winding Down of Accounts".
16 And I'd direct your attention to the first sentence of that
17 paragraph which reads, "Barclays has indicated and hereby
18 agrees that all of the accounts of LBI maintained at the
19 clearing agency subsidiaries, the accounts constitute excluded
20 assets within the meaning of the APA." Do you see that, sir?

21 A. Yes.

22 Q. Now, I understand you have your own views about what
23 that -- about how that language should be interpreted, but I
24 take it you would agree with me that that language does not
25 expressly mention the securities in those accounts, does it?

1 A. No.

2 Q. No, it doesn't mention it, or no, you don't agree with me?

3 A. No, it doesn't mention it.

4 Q. Now, still focusing on numbered paragraph 1, I'd like to
5 direct your attention to the remainder of that first paragraph.

6 So now we're on the second sentence, and that says,

7 "Accordingly, pursuant to the authority granted to the trustee

8 and the orders, the trustee hereby instructs the clearing

9 agency subsidiaries to close out the pending transactions in

10 the accounts to clearing agency subsidiaries and to use the

11 proceeds in accordance with the rules and procedures of the

12 clearing agency subsidiaries. Such liquidation transactions

13 shall be transferred to and closed out by the relevant clearing

14 agency subsidiary in the same manner as it closes out positions

15 of participants, members for whom it has ceased to act. As

16 part of this closeout process, the trustee hereby authorizes

17 DTC to deliver securities from the DTC LBI account in order to

18 reduce or eliminate LBI's outstanding delivery obligations to

19 NSCC." Do you see that, sir?

20 A. Yes.

21 Q. At that time, there were many outstanding Lehman

22 transactions awaiting settlement. Is that right?

23 A. Yes.

24 Q. And the language I've just read to you was all related to

25 closing out transactions that had begun but had not yet been

1 completed, right?

2 A. Yes.

3 Q. And as you understood it, the whole point of that language
4 was to allow those trades that were in progress to finish,
5 correct?

6 A. Could you just read that back again, the question?

7 Q. Yes. As you understood it, the whole point of that
8 language was to allow those uncompleted trades that were in
9 progress to finish, right?

10 A. Well, it was -- that's one of the purposes. But also to
11 use the proceeds in accordance with the rules and procedures of
12 the clearing agency subsidiaries.

13 Q. Okay. And the trustee's authorization for that activity
14 was required because the trustee was the holder of the
15 accounts, right?

16 A. I don't think -- I don't think that we needed specific
17 written authorization in this document, and we probably could
18 have taken the same steps without it. But given the
19 negotiations that had gone on and given the questions about who
20 was taking what and -- we wanted to be absolutely clear that
21 everybody understood what we were going to do on a going-
22 forward basis, and get everybody's agreement with respect to
23 that.

24 Q. Now, the DTCC was -- I think you testified this morning,
25 and I just want to confirm it -- you were not a party to the

1 clarification letter, right?

2 A. Correct.

3 Q. And in fact, the clarification letter was not something
4 DTCC ever intended to be a party to, and therefore, it was not
5 something that DTCC or its counsel focused on. Is that right?

6 A. Correct.

7 Q. So if the trustee, in the clarification letter, agreed to
8 the transfer of unencumbered clearance box assets to Barclays,
9 that was not DTCC's issue, right?

10 A. To the extent it was not inconsistent with this DTCC
11 letter.

12 Q. Okay, sir, I would like you to look at page 123 of your
13 deposition, please. And specifically beginning at line 19, you
14 were asked:

15 "Q. So if the trustee in the clarification letter agreed to
16 the transfer of certain assets to Barclays, that was not DTCC's
17 issue, correct? Or is that correct?"

18 And then after some colloquy, which I think takes us to
19 the next page, you answered, "That's correct, we were relying
20 on Exhibit 52." And Exhibit 52, I'll represent to you was the
21 same as BCI Exhibit 6, the DTCC letter.

22 A. The DTC letter?

23 Q. Yes. Was that testimony truthful and accurate at the
24 time, sir?

25 A. Yes. And I think that's the answer that I just gave you

1 as well to your question.

2 Q. Now, I want to make sure I understand DTC's position that
3 you stated this morning. Your position is that under the DTC
4 rules, DTC has rights to securities in a participant's free
5 account, only if those securities are designated net additions
6 or NA. Is that correct?

7 A. No.

8 Q. What other rights do you believe there are -- well,
9 actually, strike that for the moment. Now, after your
10 deposition you submitted an errata sheet. Is that correct?

11 A. Yes.

12 Q. And you'll see, if you turn to tab 1 of your deposition,
13 that your errata sheet is attached to the back of the
14 deposition, sir. It's behind a -- it should be behind a blue
15 slip.

16 A. Okay.

17 Q. And that errata sheet you prepared in consultation with
18 your counsel and with your colleagues at DTCC, right?

19 A. Yes.

20 Q. And that's because you wanted to make sure your 30(b)(6)
21 testimony on behalf of DTCC was as accurate as possible, right?

22 A. Correct.

23 Q. Now, first, let me just ask you, is the document that you
24 see attached to the back of this deposition, do you recognize
25 that as your errata sheet?

1 A. I believe it is.

2 Q. And now look at the first entry on the errata sheet, and
3 which is a correction for the testimony that appeared at page
4 14 lines 10 through 17 of your deposition, in which you were
5 responding to the question, "And did DTC have any rights over
6 the assets in the free account?"

7 In your original answer, you stated, "We have a lien on
8 all of the assets in the accounts." Right?

9 A. Yes.

10 Q. And then your corrected response reads, "Yes, to the
11 extent that securities on deposit in the Lehman 074 account
12 were designated net additions, NA, DTC had the rights of a
13 holder or an owner of those securities. NA is defined in DTC
14 Rule 1." Is that correct?

15 A. Yes.

16 Q. Now, look at the second entry on your errata sheet which
17 deals with the testimony that appeared in the transcript of
18 your deposition at pages 29 and 30. At deposition you were
19 asked, "So DTC had a lien on the assets in the free account and
20 was not prepared to release that lien unless there was an
21 adequate substitute collateral that was provided to DTCC?"

22 And your response to that question was, "Correct." Did I
23 read that correctly?

24 A. You did.

25 Q. Then in your errata sheet, you changed that response as

1 follows: "Correct, although it is not properly described as a
2 lien. Rather, DTC possessed the rights of a holder over the
3 assets in the free account to the extent such assets were
4 designated NA." Is that correct?

5 A. Yes.

6 Q. So in those revised responses, which you had a couple of
7 months to work on, you made clear that DTC had rights to
8 securities in a participant's free account only if those
9 securities were designated net additions or NA, right?

10 A. The question related to a lien on the assets. To the
11 extent that they were talking about liens, that is correct,
12 that it applies to the assets designated as NA. DTC has a
13 general right against all of the assets of any of its
14 participants with respect to losses that may be incurred as a
15 result of the events relating to that participant.

16 Q. And is that general right one that arises under the DTC
17 rules?

18 A. Yes.

19 Q. Which rule, specifically, sir?

20 A. There are indemnity provisions that are -- exist
21 throughout the rules, including DTC Rule 6, Rule 20. There may
22 be others as well, but those are the ones that come to mind
23 right now. But that's different than the lien-type discussion
24 that we were having.

25 Q. Now, sir, if some of the clearance box securities -- well,

1 let me back up a second. You're aware there's a list of
2 securities that Barclays claims that were in LBI's DTCC
3 clearance boxes as of the closing, right?

4 A. Can you repeat that?

5 Q. Yes. You are aware, sir, that there is a list of
6 securities in LBI's DTCC clearance boxes as of the closing,
7 that Barclays claims in this litigation. Is that right?

8 A. Very generally speaking, yes.

9 Q. Has DTC done any work to analyze that list to determine
10 which, if any, were designated NA as of the time of closing,
11 sir?

12 A. No. I don't know that we've ever seen the list.

13 Q. If -- now a security that's been pledged or segregated
14 cannot be NA, right?

15 A. Correct.

16 Q. And in fact, if a security had been pledged to Barclays,
17 then as of the Friday before the closing, that would not be a
18 security that DTC was looking to secure its interests with,
19 right?

20 A. If it was pledged through our system?

21 Q. Yes, sir.

22 A. And designated as such, yes.

23 Q. And DTC ceased to act for LBI on Wednesday the --
24 September 24, 2008, correct?

25 A. Yes.

1 Q. And on that date, all securities in the LBI accounts that
2 had been designated NA were swept into a DTC account, right?

3 A. Yes.

4 Q. An 1198 account? Is that the designation?

5 A. That might be the number.

6 Q. And so any securities remaining in LBI's accounts and
7 available for delivery after the 24th were not -- were, by
8 definition, not NA securities, right?

9 A. They were not NA securities, but they were available for
10 settlement of transactions that were pending for the Lehman
11 account.

12 Q. Sir, my question was, they're not NA securities, right?

13 A. Correct.

14 Q. And so any clearance box securities transferred to
15 Barclays on September 29th or 30th, were, by definition, not NA
16 securities, right?

17 A. Securities transferred out of the Lehman account?

18 Q. Yes, sir.

19 A. On the 29th?

20 Q. 29th and 30th?

21 A. Would not have been NA securities.

22 Q. Now, looking again at your errata sheet, sir, which is at
23 the back of tab 1, in the second paragraph of your first
24 corrected answer -- or your response to the second question
25 that you correct there, do you see that?

1 A. I'm not sure which one you're referring to.

2 Q. Yes, sir. The question: "What were those rights?" Do
3 you see that?

4 A. This is page 14, 10 through 17?

5 Q. No, this is -- yes, page 14, 10 through 17. "Question:
6 What were those rights?"

7 A. Got it.

8 Q. Okay. Then you write: "As a holder or owner of NA
9 designated securities in the members' free account, DTC
10 maintains the right to pledge, repledge, hypothecate, transfer,
11 create a security interest in, or assign such securities to
12 satisfy open obligations owed to it by the member. These
13 rights are set forth in DTC Rule 4(a) Section 1." Right?

14 A. Yes.

15 Q. Now, if you would take a look behind tab 3 of your binder,
16 sir, that is Movants' Exhibit 675, which is the DTCC rules. Do
17 you recognize that as the rules and bylaws and organizational
18 certificate of the DTCC?

19 A. Yes.

20 MR. SHAW: I would move that that document be
21 admitted, Your Honor.

22 THE COURT: Is there any objection?

23 MR. MAGUIRE: No, Your Honor.

24 THE COURT: It's admitted.

25 (Movants' Exhibit 675, rules and bylaws and organizational

1 certificate of the DTCC, was hereby received into evidence as
2 of this date.)

3 A. I'm assuming this is the most up-to-date version, but I
4 haven't looked at it.

5 Q. It's the one provided by the movants, in this case, Your
6 Ho -- sir.

7 A. Okay. I still can't answer that.

8 Q. Before I move forward, let me just ask one question.
9 Securities transferred to Barclays after September 23rd would
10 have been securities that DTC had no further claim to. Is that
11 right?

12 A. Transferred pursuant to instructions from Lehman?

13 Q. Yes, sir.

14 A. Yes.

15 Q. In fact, going back to Exhibit 675, behind tab number 3 of
16 your binder, sir. I'd direct your attention to page 38 and
17 ask, does that contain the Rule 4(a) Section 1, that you
18 referred to in your response in the first errata?

19 A. Yes.

20 Q. And the language you quoted in your errata sheet, "pledge,
21 repledge, hypothecate, transfer, create a security interest in
22 or assign," that appears in the first sentence of Rule 4(a)
23 Section 1, right?

24 A. Yes.

25 Q. And that sentence begins, "In furtherance of the rights of

1 the corporation, pursuant to these rules, and for the purpose
2 of securing loans made to the corporation." Do you see that
3 sir?

4 A. Yes.

5 Q. It does not say "to satisfy open obligations owed to DTCC
6 by a member." Is that right?

7 A. It does not say that.

8 Q. Now, that language does appear in your errata, "to satisfy
9 open obligations to DTCC by a member," right?

10 A. Yes.

11 Q. But that language does not appear anywhere in Rule 4(a)
12 Section 1, right?

13 A. I'd have to read this paragraph, but I don't see it right
14 now. If you want me to go through it, I can look for it. But
15 I'll take your word for it.

16 Q. All right. Now the DTCC received 250 million dollars from
17 Barclays, right?

18 A. Yes.

19 Q. And as of November 2009, DTCC's losses charged against
20 that 250 million dollars totaled about 55 million dollars and
21 change. Is that correct?

22 A. Yes.

23 Q. And any part of the 250 million that DTCC does not spend
24 will revert to the trustee at some point, correct?

25 A. I believe that's the case.

1 Q. And DTCC has incurred costs in connection with this legal
2 proceeding. Is that right?

3 A. Yes.

4 Q. Any estimate of the fees that DTCC has incurred in this
5 legal proceeding so far?

6 A. I don't know offhand.

7 Q. In the ballpark of a million dollars?

8 A. Could be that, could be more, could be less.

9 Q. And DTCC expects to claim its legal fees against the 250
10 million dollars. Is that correct?

11 A. Yes.

12 Q. And since November of 2009, any losses, essentially, are
13 legal fees related to this case. Is that right?

14 A. Legal fees, employee time, relating to administering the
15 Lehman accounts which are still at DTCC. I don't know if there
16 were any specific claims that came in with respect to
17 securities that we're holding or which may come in in the
18 future. So, but generally speaking, those are the categories.

19 Q. Okay. And the wind-down is, if not formally complete,
20 pretty close to complete, right?

21 A. Well, we're still holding some very substantial assets in
22 the Lehman accounts at DTCC and administering those pursuant to
23 the instructions of the trustee on an ongoing basis.

24 Q. But in terms of closing out the outstanding trades and
25 dealing with the clearing liability, that process is

1 essentially completed, right?

2 A. Yes.

3 Q. And the 250 million dollars, therefore, was more than
4 ample to secure your interests at the end of the day, right?

5 A. In hindsight, the closeout did not result in a loss to
6 DTCC. Over the weekend of September 19th through 21, nobody
7 could predict what was going to happen.

8 Q. I understand it was a time of great uncertainty, right?

9 A. Correct.

10 MR. SHAW: I have no further questions. Thank you,
11 sir.

12 THE COURT: Is there any redirect?

13 REDIRECT EXAMINATION

14 BY MR. MAGUIRE:

15 Q. Just one point, sir. Again, Bill Maguire for the SIPC
16 trustee. I believe you described in your testimony assets that
17 were -- securities that were NA and securities that were not
18 NA. And with respect to securities that were not NA, you
19 mentioned that they are still available for transactions
20 pending for the Lehman account. Can you please describe what
21 you meant by that?

22 A. The -- this goes back to September 22nd, 23rd, 24th. The
23 NA securities represent securities that were delivered into the
24 Lehman account and for which Lehman had not yet paid for. And
25 with respect to those securities, we had specific rights as

1 defined in the rules. With respect to all the other securities
2 in the account, to the extent that they were not designated as
3 exempt, there would be a standing instruction from participants
4 to use those assets in their DTC account to satisfy the open
5 obligations at NSCC -- transactions that had not yet been
6 completed.

7 And so to the extent that there were open transactions at
8 NSCC which had not yet been filled and there were assets
9 available in the participants' DTCC account that were not
10 exempt, for example, customer securities or pledged, those
11 would be used to satisfy the NSCC obligations, and that's what
12 was described in the DTCC letter agreement, that we were
13 getting specific instructions from the trustee in that document
14 for us to be able to do that.

15 Q. Thank you, sir.

16 MR. MAGUIRE: No further questions.

17 THE COURT: I assume that question doesn't prompt
18 additional questioning?

19 MR. SHAW: No, it does not.

20 THE COURT: Mr. Montal, you're excused. Thank you.

21 THE WITNESS: Thank you, Your Honor.

22 MR. KIRPALANI: It's still morning. Good morning,
23 Your Honor.

24 THE COURT: Still good morning.

25 MR. KIRPALANI: Susheel Kirpalani from Quinn Emanuel

1 on behalf of the committee. The creditors' committee would
2 like to call Saul Burian.

3 THE COURT: All right.

4 MR. KIRPALANI: We do have some witness books, Your
5 Honor. I think my colleague can just pass those out in the
6 interim.

7 THE COURT: That would be fine. Thank you.

8 Those probably should be cleaned up.

9 (Witness duly sworn)

10 THE COURT: Be seated, please.

11 DIRECT EXAMINATION

12 BY MR. KIRPALANI:

13 Q. Good morning, Mr. Burian.

14 A. Good morning.

15 Q. For the record, can you give us your full name?

16 A. Saul Elliot Burian.

17 Q. And by whom are you employed?

18 A. Houlihan Lokey Howard & Zukin Capital Inc.

19 Q. And what is your current title?

20 A. I'm a managing director in the financial restructuring
21 group.

22 Q. And for how long have you been at Houlihan?

23 A. About eight years.

24 Q. And how long have you been providing restructuring
25 advisory services?

1 A. If you include my time as counsel, it's been more than
2 twenty years.

3 Q. And how long were you an attorney?

4 A. I graduated in 1988. Started later that year. So from
5 then till about eight years ago.

6 Q. And what was your practice area as a lawyer?

7 A. I started out specializing in corporate transactions in
8 troubled situations, and then with some kicking and screaming
9 became a full-fledged bankruptcy restructuring attorney.

10 Q. I've been through that myself. What would you describe
11 your responsibilities as a managing director at Houlihan?

12 A. At Houlihan Lokey, I'm one of three managing directors in
13 the New York office. I work on complicated creditor and
14 company side engagements. But I also manage our distressed M&A
15 practice, east of the Mississippi.

16 Q. In that role, do you have significant experience in
17 Section 363 sales?

18 A. I do. I mean, obviously I had experience before that
19 role, which is how I got the role. But essentially, I not only
20 personally work on and supervise distressed M&A activities, but
21 also supervise others who are managing transactions and act as
22 an internal resource for them.

23 Q. Turning your attention to the Lehman case, when did the
24 creditors' committee select Houlihan as a financial advisor?

25 A. Sometime Wednesday night after the filing.

1 Q. That would be September 17, 2008?

2 A. That is correct.

3 Q. And what was your role specifically from the Houlihan
4 team, initially?

5 A. Well, our first role was to pitch the matter and win. And
6 I was one of three managing directors who led that effort. As
7 part of that presentation, I focused on the Barclays sale
8 transaction that had been filed shortly before that.

9 Q. And did you have any colleagues at Houlihan at the senior
10 levels that were helping you?

11 A. Our co-CEO, Jeff Werbalowsky, attended the pitch. Eric
12 Siegert, managing director out of the Minneapolis office was
13 there. We had a real estate partner. I believe that we had
14 Mike Fazio from financial advisory services there. But that
15 was the main -- the main pitch team was the three of us.

16 Q. So following the pitch, when you were selected by the
17 committee on Wednesday, September 17th, what did Houlihan start
18 doing as part of its initial assignments?

19 A. We didn't get retained or told we'd be retained until
20 somewhat late that evening. And we tried to -- we also were
21 introduced to FTI Consulting, which was retained as our
22 co-advisor as well. And we immediately set up a meeting for
23 the next day with the company and its counsel and tried to
24 organize ourselves into work teams, so that in a very short
25 period of time we could try to be as productive as possible

1 with a minimum of duplication of effort.

2 Q. Did you have any understanding of a sale effort for
3 Lehman's broker-dealer assets at that time?

4 A. Oh, yeah. We were informed that evening that there was a
5 hearing before this Court earlier that day. The committee had
6 asked for an adjournment -- I don't remember if it was of that
7 hearing or the Friday approval hearing, one of the two, and
8 that that adjournment was denied. And therefore, it was now
9 Wednesday night, and Friday morning, there was going to be a
10 sale hearing.

11 Q. And before you had any meetings with Lehman, did you have
12 any understanding as to what the transaction between Lehman and
13 Barclays was supposed to look like?

14 A. Well, I'd read the asset purchase agreement. I'd read the
15 motion. I'd read newspaper articles and the like. You know,
16 my understanding, you know, was from those sources, generally
17 that Barclays was going to take -- basically Barclays was going
18 to cherry-pick assets that they wanted. Pre-filing, there was
19 a deal to buy all of Lehman. There was a view that Lehman had
20 many toxic and other real estate and other assets that were
21 difficult to value or uncertain -- you know, what liabilities
22 went with those assets; and that bankruptcy was being utilized
23 to make sure that Barclays got what they wanted and could leave
24 behind what they didn't want, and could pick up the broker-
25 dealer and the real estate.

1 Q. Using 363 to pick up certain assets and leave others
2 behind, that's fairly common, isn't it?

3 A. It's not uncommon. Obviously, in this case there are
4 implications from that. But yes, it's common to use 363 for a
5 buyer to buy what it wants and leave behind what it doesn't
6 want.

7 Q. As used in this case, were there any implications of that
8 type of transaction that gave you concerns?

9 A. Yeah. We were very worried about -- about it. Frankly,
10 it was unclear to us what was being taken and what wasn't being
11 taken from whom -- you know, the LBI estates versus what we
12 call the A&M estates, Lehman entities that are managed or
13 controlled by Alvarez & Marsal, for whom we are a fiduciary as
14 well; issues with respect to how the estates would function
15 post-closing; and what implication the Barclays transaction
16 would have on the value and ability to monetize the remaining
17 assets.

18 Q. Did the timing of the transaction concern you at all in
19 terms of ensuring a fair process?

20 A. Very much.

21 Q. Okay. Let's turn our attention, then, to the next day,
22 and move along. So the next day was Thursday, September 18th.
23 What did you do to educate yourself further about the details
24 of the Lehman-Barclays transaction?

25 A. Well, we had organized an all-hands meeting at Weil

1 Gotshal to get the inside scoop and download from the debtor
2 and counsel as to what the transaction was and what the
3 transaction wasn't. I refreshed my recollection with respect
4 to all my issues and questions. And frankly, we scurried to
5 make sure we had the right people there and not there. And
6 prior to the commencement of that meeting, my main activities
7 were getting there and getting the right people there.

8 Q. Who did attend the meeting from the committee side?

9 A. It was a very large meeting in one of the large Weil
10 Gotshal conference rooms. Eric Siegert, Brad Geer and I, and I
11 believe Mike Fazio, were the main managing directors, senior
12 people at the meeting. There were two sides of the FTI firm
13 that was there, one that was more focused on the transition
14 services issues, and then the Mike Eisenband side, that were
15 more focused on general advisory issues. I don't remember how
16 many people -- I would seven, eight or nine, from that firm.
17 We had the Milbank contingent, you know, Dennis Dunne, Luc
18 Despins, and others. There was a committee meeting immediately
19 afterwards, but the committee members I don't recall attending
20 the meeting with Weil Gotshal and the company, although it
21 could be that one or more of the co-chairs attended. I just
22 don't remember.

23 Q. And what about from the debtors' side? Was it
24 professionals only, or was it a mix?

25 A. No, there were people from Lehman there. The main

1 participants at the meeting were Harvey Miller, Tom -- I always
2 forget his name --

3 Q. Roberts?

4 A. -- Tom Roberts. I believe Lori Fife was there. And there
5 were a variety of other both corporate and restructuring
6 attorneys. And from Lehman there was Mark Shapiro, Jim Seery,
7 as well as, I believe, a number of others. I don't remember if
8 Bart McDade was there or not.

9 Q. And was this a meeting that was specifically designed just
10 for committee professionals, or was it a general any-creditor-
11 who-wants-to-come-can-come?

12 A. Oh, no, no. This was very clearly a confidential meeting
13 of committee professionals to sit down with us and make -- and
14 explain to us, you know, notwithstanding newspaper articles and
15 rumors, what -- how do we get here, where are they going, and
16 what is the deal.

17 Q. And was -- when you say "the deal", was that the sale
18 transaction that you're --

19 A. Yes, yes, yes.

20 Q. -- okay.

21 A. What were they proceeding to get authority for the next
22 day -- the next morning.

23 Q. And how was the sale transaction described to you?

24 A. The sale transaction was described as something that was,
25 you know, critical and necessary, emergent, you know, no

1 apology for the timeframe. They recognized that there was very
2 little that we could do with respect to, you know, diligence in
3 the transaction; a recognition about the absurd circumstances
4 we found ourselves. There was discussion that there really was
5 no third-party alternative; that the process had been mo --
6 going on for a period of time. The rumors about Korean bidders
7 or about other potential bidders, that they did not believe
8 that there was any serious opportunity for a third party to
9 move forward. A lot of discussion, rhetoric, about how, you
10 know, the Fed and the SEC and the government and everyone else,
11 you know, found this to be critical. A discussion with respect
12 to functioning of the capital markets. Discussion about the
13 benefits -- the societal benefits. The fact that by preserving
14 the broker-dealer we were preserving jobs, we were preserving
15 the ability of customers who had faith in Lehman and left their
16 securities in Lehman, that they would have the ability -- avoid
17 the distraction and the difficulties of having to extract the
18 accounts in a liquidating SIPC procedure, and that liberating
19 those accounts had a significant societal, you know, good.

20 I don't mean to minimize any of those things, but we did
21 want to focus on our issues, which we were fiduciary for the
22 debtor estates, what was the benefit or detriment to the Lehman
23 entities from the transaction. And there was a discussion
24 about, specifically to us, what was the benefit to us. Not
25 denigrating the other benefits, all things being equal, but for

1 employment or for liberating accounts so people can function.
2 But the benefit to us was described as being able to avoid
3 significant potential liabilities. We too are a creditor of
4 LBI, and therefore, to be able to function there was important.

5 There was a view that there was concern as to the LBHI
6 estate's cash position, and that by selling the real estate at
7 fair value it would provide real cash in our pocket. There was
8 a recognition that we were getting 250 million dollars for our
9 interest in the broker-dealer. It was assumed in the room that
10 that number was laughably small as compared to what its true
11 value was, even days or hours earlier; but also a recognition
12 and a discussion that if not sold to Barclays or not finding a
13 home relatively quickly, that while this was an incredibly
14 large bargain for Barclays, it would be worth virtually nothing
15 to us. And therefore, don't look in their pocket, look in your
16 pocket. And 250 million is better than nothing. And that
17 money would go -- would help for the administration of the
18 case. So the real estate and the sale of the broker-dealer
19 would provide cash in our pockets.

20 And then, of course, there was a discussion about the
21 benefits and detriments of the sale book, the broker-dealer
22 assets, and the pros and cons of selling those assets to
23 Barclays.

24 Q. What was your understanding of the pros and cons of
25 selling the book as part of the transaction, to Barclays?

1 A. Well, sitting in that meeting, there were really two
2 critical issues in our minds. One was what is the book, what
3 are those assets, and what are the implications vis-a-vis the
4 balance of the administration of the Lehman estates. Do they
5 include LBHI assets? In the cherry-picking of assets, what was
6 in what was out? Would there be assets being sold that would
7 hamper our ability, for instance, to sell the investment
8 management division? I think Your Honor knows that division
9 more under the name Neuberger Berman. Were there -- you know,
10 what derivatives or nonderivatives were being included? So the
11 first category of concerns was, what's in and what's not.

12 Second is, what are they being sold for? Is this fair, is
13 this unfair? And there, we were given very, very firm
14 assurances, A) this is the trading book; this is the bulk of
15 assets directly related to, and in fact owned by LBI. These
16 are the assets in the ordinary course the broker-dealer uses in
17 their business; and that these are not, you know, the other
18 assets that people commonly were talking about that may have
19 led to Lehman's demise. These were the liquid or the more
20 liquid assets that were part of the broker dealer. And -- so
21 don't be worried about that.

22 And we talked about things like the use of the Lehman
23 name; how we're going to function in foreign jurisdictions.
24 Don't worry, we thought a lot about that. Those are not the
25 assets that are going.

1 Second issue was the value of the assets. And there we
2 were told -- I know this has been bandied about a lot, you
3 know, about a balanced or matched transaction -- in respect of
4 these assets, it was made very clear to us that we were
5 benefitting, because we were selling assets and liabilities in
6 a balanced transaction in respect of these assets. These were
7 the more liquid broker-dealer assets, and that in lieu of a
8 wholesale liquidation in which we'd have to take a liquidation
9 value for these assets, and recognizing that at that time, the
10 going-concern value, mark-to-market in the manner in which
11 broker-dealers, usually market these assets -- market these
12 assets, it may be at a low point as compared to where things
13 were six months or a year ago. But in the context we find
14 ourselves, it was a fair, balanced transaction, and we were
15 avoiding unwinding, selling, dumping these assets and getting a
16 liquidation value for these assets, as opposed to a going-
17 concern.

18 Q. Did you receive any materials at that meeting at Weil to
19 summarize the transaction?

20 A. Very little. We got one page of a balance sheet, that we
21 used --

22 Q. Let me show you -- let me show you what is marked -- or if
23 you can turn to your tab, it's Movants' Exhibit 2.

24 A. Am I supposed to look at the book or at this screen or --

25 Q. Whichever you prefer. They should hopefully match up.

1 A. Okay. Yes, I see the balance sheet.

2 Q. Is that the document that you were referring to that was
3 given to you at the Weil Gotshal meeting on the 19th?

4 A. If that was what that -- I get confused by dates. If
5 that's the Thursday meeting, yes.

6 Q. Yes, that's the Thursday meeting. And what was the
7 context of the use of this document during that meeting?

8 A. Oh, this was handed out to us in order to discuss the last
9 item on -- the two issues that we had on the last major
10 conversation that I talked about just a moment ago, which
11 related to what were the assets that were going and what was
12 their value and was it fair.

13 Q. And how did this document purport to show that it was
14 fair?

15 A. Well, what they did was they walked us through and said
16 hey, on the left side we have essentially the broker-dealer
17 assets. And if you look at the bottom, you'll see a lot of
18 zeros. And they said, you know, don't worry, all these other
19 issues are not going to Barclays. We're not affecting the
20 issues with respect to intercompany accounts. We're not, you
21 know, focusing on, you know, receivables. All of those issues
22 are going to be left behind in the estate. All we are doing is
23 moving, you know, the issue -- the assets that are directly
24 related to the broker-dealer.

25 You'll notice on the left-hand column, it was pointed out

1 to me, that there's no real estate. You know, Lehman has a
2 huge book of real estate assets. You'll notice that there
3 isn't here, you know, the private equity book. There isn't
4 the, you know -- all the stuff I'm spending my life on the last
5 year and half, dealing with the Lehman estate, they're not
6 here. It's only relating to, you know, these assets that are
7 relatively -- you know, mortgages, commercial paper, government
8 and agency securities, which is the bulk of this, you know, the
9 relatively liquid securities that were used or owned, you know,
10 by the broker-dealer.

11 And then you move to the right side, they said to me --
12 they said to all of us, you know, look at the match. If you
13 look at this, there's a Fed loan which we need to, you know,
14 repay. And then there's a variety of contras which is -- the
15 way I understood it was short positions or obligations to
16 deliver securities, so that these were directly related to the
17 assets or liabilities that in the ordinary course of a broker-
18 dealer were moving along with those securities. And golly gee
19 whiz, they matched up, you know, about thirty-four billion
20 against roughly sixty-three billion of assets. And then you
21 looked at, again, the collateralized short-term funding was the
22 government loan. And then you looked at it and said net-net-
23 net, you had roughly 72.5 of assets against roughly 68.4
24 billion of liabilities that Barclays was either assuming or
25 dealing with.

1 And then right off -- they told -- we were told, these
2 numbers were right off the books and records of Lehman, but
3 they were also taking roughly four and a quarter billion of
4 liabilities for cure and comp, and therefore, you know, based
5 on the mark to value of book, based on the value of the assets,
6 of the liabilities being picked up, it was a, you know,
7 balanced exchange of exactly 72.65 against 72.65.

8 Now, to be fair, so I don't have to come back and correct
9 my testimony, they did tell us they weren't sure, sitting in
10 the room, that all these assets were really there and that all
11 these liabilities were really there, that there were a lot of
12 issues with respect to closeouts, with respect to repos that
13 didn't come back; and that they would need to reconcile which
14 of these assets and which of these liabilities were really
15 going to show up by the time the closing came. But don't be
16 worried, you know, it is what it is. They'd go in tandem. And
17 therefore, with respect to these assets, we were avoiding
18 liquidation and getting the benefit of a matched exchange.

19 Q. Did you ask for an opportunity to try and diligence this
20 summary schedule?

21 A. You know, we started to ask some questions about these
22 securities, but we're talking about, at this point, sometime,
23 you know, late Thursday morning early Thursday afternoon. You
24 know, we were told that there would be a more, you know,
25 junior-level business discussion at some point on Thursday.

1 We'd be able to get answers to whatever questions we had. But
2 the context and the clear understanding in the room was, we're
3 moving along on Friday and there's very little diligence you're
4 going to be able to do. You're going to have to trust us on
5 this.

6 Q. And did you ask any other questions or raise any other
7 issues with them?

8 A. Oh, yeah. You know, those who know me know I'm often not
9 shy. I tried to ask questions. For instance, I had a series
10 of questions about the purchase price adjustment. It seemed
11 very limited, constrained, oddly drafted. I started to ask Jim
12 Seery and Mark Shapiro about that. I also, together with
13 others, asked what I think is a fairly typical question for a
14 creditors' committee in a position where you're behind in the
15 game, and that was: Okay, we have a fairly limited time to
16 ferret out, you know, all the issues. There must have been, in
17 your dealings over weeks and months with Barclays, a variety of
18 issues that in good faith, the debtor thought they should have
19 gotten from Barclays. There have got to be issues. It's such
20 a complicated transaction. What were the list of things that
21 you, Lehman, you Weil Gotshal, sat in a room and asked for?
22 What were the last-minute grabs by Barclays where you felt you
23 had no choice but to say yes to? Give us a list. And let's
24 pound the table today and try to get them for you. You know,
25 it's not an unusual idea that in exchange for committee

1 consent, you know, there's got to be things that we could
2 essentially try to get a double dip from Barclays for.

3 Q. And was the purchase price adjustment one of those things?

4 A. When you say one of those things, it was one of the things
5 I would have imagined would have been on their list. As I
6 discussed earlier, I began to go down the road of asking
7 pointed questions about it. But it wasn't on their list.

8 Q. Did they have anything to say at all about the purchase
9 price adjustment?

10 A. Well, you've got to look at it in the context of the
11 conversation. They were made to very clear to us, thank you
12 but no thank you, we don't want your help. We don't have such
13 a list. There's not going to be a negotiation, and we don't
14 have a list of issues for you to pursue. The deal is fair. We
15 worked as hard as we can. We're going to have enough trouble
16 closing the deal we have. We think that in light of the
17 circumstances, we've done a very, very good job of protecting
18 the estate in the ways in which I described. And we're
19 basically not going to give you such a list.

20 I did go down the road of trying to say, well, let's talk
21 about the purchase price adjustment. I think I got two
22 questions in and then got cut off by Harvey who said, we can
23 cover all of that, you know, in a meeting that's with people
24 less important than the people in the room right now. But you
25 know, it is what it is. Jim and Mark did point out to us, in

1 the room, that we may not want to spend a lot of time on the
2 purchase price adjustment, because it was unlikely to survive
3 in the final deal anyway.

4 Q. What was your reaction to the statements by the Lehman
5 folks that the purchase price adjustment feature was likely to
6 be eliminated?

7 A. You know, it's hard to separate my reaction to that
8 particular statement versus my reaction to everything. But on
9 that one in particular, you know, it didn't surprise me that
10 much, honestly. It was so convoluted and constrained, it
11 wasn't worth much anyway. So it didn't surprise me that if
12 there was continuing give-and-take between Barclays and Lehman,
13 that Barclays would prefer not to have it and that Lehman would
14 ultimately, you know, give in on it. So it wasn't surprising.
15 I would have preferred them telling me yes, let's work together
16 arm-in-arm to make it better and meaningful. But it didn't
17 surprise me.

18 Q. Are you aware that Barclays has characterized this dispute
19 as the committee seeking to retrade the transaction and get a
20 purchase price adjustment through the back door?

21 A. I am. I was at the opening argument. And I've heard that
22 being prominently discussed.

23 Q. And what's your reaction to that?

24 A. I just don't know what to say anymore. I mean, nothing
25 could be further from the truth. It is completely and

1 absolutely not true. I can tell you categorically that we were
2 pushing for discussion, investigation, reconciliation of this
3 transaction long before the markets recovered. I could tell
4 you that I've been a primary person at Houlihan Lokey dealing
5 with these issues, and I have never, not once, with anyone, on
6 my side or on the company's side -- I don't really deal with
7 the SIPC trustee much, so I can't account for that -- ever had
8 a conversation regarding ha-ha, market's been up, now is the
9 time to pounce.

10 We've had discussions about, you know, pursuing this. We
11 had conversations about the timing to pursue. We've had
12 conversations regarding do we have enough evidence to pursue.
13 Never, have I ever had a conversation about we don't want to do
14 this now because the market's down; now's a good time because
15 the market's up. And frankly, my understanding of this, and it
16 could be completely wrong, is we're not looking for the benefit
17 of a market move. I don't understand this dispute as we make
18 more money if the market did better a moment after the sale.
19 My understanding of my part of this is, on the day of the
20 close, did we get a good-faith mark to market as a broker-
21 dealer typically would get, of the value on that date. And in
22 fact, maybe we'll get to it later, I wrote a memo to the
23 committee that specifically told them this. And it was clear
24 to me from the beginning.

25 And you know, people can say what they want to say. I was

1 there, they weren't. And I've been around from day one and
2 throughout. It's categorically not true.

3 Q. We will be covering a lot of the things that you
4 mentioned, Mr. Burian. But turning back, now, to the meeting
5 on the 18th, that's the Thursday, what did you consider
6 Houlihan's critical next steps?

7 A. Well, it's like drinking from a fire hose. I mean, we're
8 talking about -- I mean, Barclays is only one of many, many,
9 many issues that were of great concern. So if you're asking me
10 about Barclays, or are you asking about generally, you know --
11 they're two different answers. With respect to Barclays it
12 was, as best we can, you know, let's figure out with the
13 committee what we're going to do on Friday, in fact -- if in
14 fact that's going forward; and what we could do to get a better
15 handle on what the transaction is. And more broadly, we're
16 talking about the largest, most complicated bankruptcy ever,
17 when we're dropped into this cold turkey, and we needed to
18 figure out where we could add value, what was going on, how do
19 we preserve, protect and maximize value.

20 Q. Staying on Thursday, did you have any or arrange any other
21 information sessions, either by phone or in person with the
22 Lehman side?

23 A. Well, we did two things. First we had a very long
24 creditor -- committee call to try to update them of what was
25 going on, try to get some direction. When it came to diligence

1 and work we did two things. We understood just how hard the
2 Lehman team were working. I mean, it's hard to describe the
3 body language in the room. We were also trying to be sensitive
4 to the devastation of their personal, you know, circumstances.
5 There were people in the room -- I mean, Jim Seery looked
6 terrible, I mean, Mark Shapiro certainly wasn't happy. These
7 are people I've known for years, they lost personal wealth. It
8 was a very, very difficult time.

9 And we told them that we know how hard they're working.
10 We know how many nights they haven't slept. They need to talk
11 to us. We need to get some diligence. We need to get an
12 update. And it was left that at some point that afternoon into
13 that evening, that night, they would get back to us and have a
14 meeting or a conference call to tell us what they could in
15 advance of the hearing.

16 At the same time, I reached out to Steve Berkenfeld who
17 was represented to me to be a former lawyer, a person who was a
18 senior person on their risk committee, very active throughout
19 the whole Lehman enterprise, in order to sit down with him and
20 his team to get as much of the download as I could about
21 everything else that was going on and about some of the
22 background. It was felt a lot of pressure. We weren't sure
23 who was still going to be around after Friday or Monday and who
24 was still going to be an employee of Lehman after Friday or
25 Monday as compared to Barclays. And I really wanted to sit

1 down with him in particular to get a feel for what was I going
2 to do for the next two, three years of my life.

3 Q. Okay. So again, staying on Thursday, did Houlihan
4 actually have a follow-up diligence-type call to understand
5 where the Barclays transaction stood by that night?

6 A. Yeah. Both of those things were set up. I met with Mr.
7 Berkenfeld, you may get that later, over at Lehman. And the
8 rest of my team, at some point that evening, that night, had a
9 diligence call led by Jim Seery on the Lehman side.

10 Q. And what's your understanding of what updates there were
11 to give on the Barclays-Lehman transaction, as of Thursday
12 night?

13 A. For the most part, it was an update with respect to what
14 was said earlier in the other Thursday meeting. Mr. Seery made
15 very, very clear that things were very much in tumult over at
16 Lehman; there they're very distressed by the amount of
17 closeouts, the fact that they cannot truly account for a large
18 portion of their securities, and we should not be surprised if
19 the numbers changed dramatically because of -- you know, there
20 won't be sixty-two some-odd billion of assets. Some of those
21 assets have not reappeared in the Lehman accounts.

22 There was a discussion about the sale process, the Koreans
23 and others, and the fact that this was a very active sale
24 process under extreme circumstances, and there really is no one
25 else. A discussion that the markets were moving away from them

1 and that they're concerned that the value of the portfolio has
2 dropped in value. Sitting here, I honestly don't remember
3 every detail. As you know, there were detail notes taken of
4 that meeting. And I reviewed those notes then and I reviewed
5 those notes when it was put in front of me at my deposition.

6 Q. So turning, then to Friday, this is the day of the sale
7 hearing, Mr. Burian. Did you have any further calls with any
8 Lehman people as of Friday morning?

9 A. I did. Thursday -- I mean, at the end of Thursday, you
10 know, the call basically -- that call did not really uncover
11 new information. We were not given, you know, an update of
12 what the estate was actually going to come to court with. And
13 in light of travel and other schedules, I was the point person
14 for Lehman to call and say okay, what's going on. Some
15 point -- at the time, by the way, we thought there was a ten
16 o'clock hearing before Your Honor. And I got a phone call
17 telling me, no, no, no, no, that call's going to be
18 adjourned -- meeting was going to be adjourned -- the hearing
19 was going to be adjourned and moved off. They're having
20 substantial problems figuring out what assets were still in or
21 out of the deal. They're having all sorts of problems with
22 JPMorgan, DTC and others, and in fact, Barclays is threatening
23 not to close, because it was no longer a balanced transaction,
24 and that they needed to find -- I don't remember if it was
25 exactly of which conversation of Friday, but at some point it

1 was communicated to me that there was scrambling to find
2 additional assets in order to balance the transaction.

3 MR. KIRPALANI: Your Honor, the -- I would like to
4 show Mr. Burian some of his notes from that conversation, but I
5 realize that we're just about up to your traditional lunch
6 hour.

7 THE COURT: This would be a good time to stop, then.
8 And let me remind everybody that I have a 1:30 argument in a
9 Lehman-related matter, but it has nothing to do with this
10 dispute. So that if you have papers at counsel table, you
11 should at least put them in some relatively secure pile.

12 And I'm assuming that the argument will run from
13 roughly 1:30 to approximately two o'clock. And for that
14 reason, we'll probably take a break at the end of that argument
15 to give everybody a chance to reassemble. But you're certainly
16 welcome to come in and listen if you have any interest or to
17 take a longer lunch, which is fine.

18 So for purposes of the Court, we're adjourned till
19 1:30. For purposes of this hearing, we're adjourned until
20 sometime shortly after two.

21 MR. KIRPALANI: Okay. Thank you, Your Honor.

22 (Recess from 12:28 p.m. to 2:15 p.m.)

23 THE COURT: Be seated, please.

24 MR. KIRPALANI: May I proceed, Your Honor?

25 THE COURT: Please do.

1 MR. KIRPALANI: Thank you.

2 BY MR. KIRPALANI:

3 Q. Good afternoon, Mr. Burian. I think before the lunch
4 break we were just starting to talk about a telephone
5 conference or several conferences that you were having with
6 Lehman representatives on the morning of the sale hearing. So
7 if we can just get right back into that. First let me just ask
8 you, did the conversations consist of more than one phone call
9 or was it one phone call?

10 A. It was more than one.

11 Q. Okay. How many calls do you think it was?

12 A. I believe it was two, but one of them was quite long with
13 many, many interruptions -- quite long -- was longer than the
14 other one and had many interruptions. There was -- either I
15 was put on hold or sort of muffled the receiver or -- it was a
16 longer conversation with two parts to it.

17 Q. And who was on the call from the Lehman side?

18 A. The main speaker was Jim Seery, but I believe Mark Shapiro
19 was on. I think -- there were certainly other people in the
20 background. I don't think they were talking to me or listening
21 to me. I think they were all yelling and screaming at each
22 other. But there was other noises in the background.

23 Q. And who was on the call with you?

24 A. Just me.

25 Q. Just you, okay.

1 A. The first one, for a portion, Mike Fazio may have been on.
2 But the primary person was me.

3 Q. Did you take any notes during this call?

4 A. I did.

5 Q. I'd like to refer you to -- it's in your binder there, but
6 hopefully we can get it on the screen as well -- Movants'
7 Exhibit 380.

8 A. Yes, I see my notes.

9 Q. There's several pages here. I'd like you to walk through
10 them. I'm not sure all of them relate to this conference.
11 Could you just start with the first page and just flip through
12 and let the Court know what these notes relate to, and then we
13 can come back and talk about specifics?

14 A. The first and second page, Your Honor, relate to my
15 conversations and meetings with Steve Berkenfeld and his team
16 regarding -- I mean, tangentially relating to Barclays, because
17 in some respects, what wasn't going to Barclays relates to what
18 Barclays -- for the most part related to the Neuberger Berman
19 division and a variety of other assets for potential lawsuits,
20 and asset classes, not directly talking about the Barclays
21 sale.

22 If you turn to the third page, I guess, 189, the top of
23 the page, you know, until the box that's crossed out, is a
24 continuation of that conversation. The 40 -- 4.69, 3.61, 512,
25 is a summary tally by me trying to keep track of some of the

1 things Steve was telling me or maybe that happened the next
2 morning. My conversations with Jim Seery and with Mark Shapiro
3 start where it says, "LBSB" and there's a large box and cross-
4 out.

5 Q. Okay. Let's stop there. Could you recount for the Court
6 the sum and substance of your conversation with Mr. Seery and
7 Mr. Shapiro? And feel free to refer to your notes if it helps
8 you with your recollection of that conversation.

9 A. Sure. They called and they told me that they're not ready
10 to go forward, that it's going to be adjourned. I had been
11 calling saying, you know, I got to get down to court and the
12 committee wants to know what's going on, you'd said there'd be
13 changes. They called and said to me -- and said, okay, the
14 deal is changing. We're not going to have roughly the seventy
15 billion matching transaction anymore; a lot of assets haven't
16 shown up. And he started to very, very quickly, in a
17 clearly -- my impression was that Jim and Mark were --
18 understood the need to talk to me, but I wasn't their most
19 important conversation of that morning, and therefore they were
20 trying to race through this and then go back to what they were
21 doing. And it was a garbled conversation. I started to take,
22 you know, quick notes, roughly speaking, 50.64 billion of
23 assets, a portion of which related to agencies -- you know
24 equities and corporates.

25 I tried to get down the sum and substance with respect to

1 the deal as opposed to focusing on how the assets were divided.
2 You see here that he tells me that they took out all the Fed
3 securities. This is when I found out that Barclays had stepped
4 into the shoes of the Fed, were now the repo participants. I
5 was told they borrowed forty-five and a half billion dollars,
6 and there may be a five billion dollar difference between those
7 assets and the Fed loan. Cure payments, there's no difference.
8 Goodwill payment no difference. They're still taking comp and
9 severance.

10 This is when he told me that there may be -- the real
11 estate may be 110 million dollars shy -- lower than expected.
12 And also that we in fact have lost the upside in the portfolio.
13 And this is, again, my recollection of a very quick
14 conversation that quickly became irrelevant.

15 Q. So let me just clarify one thing that when I first got
16 involved in this case, I was confused by. The seventy billion
17 that was talked about originally, you testified, and then now
18 it's more like fifty. Did you understand that at that time or
19 today to be a loss of value of twenty billion dollars? I think
20 you referred to assets not showing up. Can you just describe
21 how numbers were explained to you to go from seventy to fifty
22 in the first place?

23 A. Yeah, you're going to hear a consistent theme from me, and
24 that is, we were hearing two strains of thought. One was
25 assets just weren't showing up. DTC, JPMorgan, counterparties,

1 repos that -- they just didn't know what they -- Lehman just
2 didn't know what they had, what they could transfer, what
3 they'd be permitted to transfer, and therefore the corpus of
4 assets, it was unclear what would go, which obviously affects
5 value. If you don't have it you can't transfer it and it can't
6 be set off against a liability. And we kept on hearing a
7 constant refrain that the markets were doing poorly, that the
8 Lehman assets being transferred to Barclays were -- I think the
9 phrase was "cratering", and that therefore Barclays was
10 extremely upset that they weren't getting the value they were
11 promised.

12 So whenever we talk about what is going to Barclays as
13 part of this matched transaction, both of those things are
14 running through my head. Some of it was, it's just not there.
15 Some of it is, what's there is worth less -- not worthless,
16 worth less.

17 Q. Got it. Thank you for that clarification. Can I ask you
18 what the significance of the X through this portion of your
19 notes is?

20 A. Yeah. It was a conversation, a lot of noise in the
21 background. Seery was clearly under pressure, talking quickly.
22 And he goes -- and I was asking some questions. And he goes,
23 you know something, scratch that. That's all wrong. Let me
24 go -- let me give it to you again and not confuse you. And I
25 said fine, and I crossed it all out, and I turned the page.

1 Q. Okay. Before we turn the page, is it your testimony here,
2 sir, that you crossed this out at the time of that conversation
3 as opposed to sometime later?

4 A. I crossed -- this conversation was maybe six to seven
5 minutes. I was writing as quickly as I humanly could to keep
6 up with him, who was racing to give me information. And I was
7 confused by some of the information. You'll see a note on the
8 side. And I started to say slow down. He was disturbed by
9 somebody else. He said, okay, forget it, that's all wrong,
10 scratch that. And I xed it right there and then and turned the
11 page.

12 Q. Okay. So what'd he tell you next?

13 A. There was a delay of some time. I don't know if it was
14 thirty seconds or four minutes, honestly. I was on hold or on
15 mute -- I don't think I was on hold because I heard all sorts
16 of activity in the background. He then came up and said, let
17 me give it to you straight, let me tell you what's going on.
18 This is what we're going to the judge with. And then he
19 started talking -- as you'll hear in a minute, part of what he
20 was telling me was relating to subsequent modifications that I
21 didn't know about. And some of it was, you know, directed to
22 what was going to come to court in the next few hours.

23 So he said to me, we only have forty-five and a half
24 billion dollars of long positions left. That all the shorts
25 were closed out. My shorthand shorts, we understood also meant

1 all the contras all the liabilities, that basically Lehman was
2 only transferring assets not liabilities. So now -- that's all
3 that was left. The loan -- the Fed loan that came from
4 Barclays was also forty-five and a half billion dollars. The
5 real estate, we're losing a hundred million dollars. Comp and
6 severance was fine. Again, reiterating a loss in the upside of
7 the market -- the upside of the portfolio, the purchase price
8 adjustment. There'd be no cash in the deal. If you remember,
9 the balance sheet had about 0.7 of cash going to Barclays. No
10 cash in the deal whatsoever.

11 A little longer conversation about the PIM brokers.
12 The PIM brokers were -- I forget the exact acronym, but I
13 believe it was the principal investment managers. Essentially
14 there was a lot of confusion in my mind as to how this sale
15 would encroach on our ability to sell the investment management
16 division or as Your Honor has heard about the division,
17 Neuberger Berman. And to the extent that there were brokers at
18 Lehman vis-a-vis at the Neuberger Berman division, the
19 committee wanted me to be careful that Barclays was not taking
20 assets that would unduly, you know, inhibit our ability to get
21 full value for that division.

22 Jim was trying to point out to me -- it was clearly
23 not his division or his expertise -- but explain to me that 350
24 brokers were going; that that number had shrunk because of
25 losses of people; that these were people historically at the

1 Lehman business even before Neuberger Berman was bought; they
2 were not integral to the business but more focused on selling
3 broker -- doing trades with the broker-dealer; and we shouldn't
4 be concerned. And that's what the confusion was about these
5 parties.

6 He then started going very quickly into DTC's giving
7 them a very hard time. They don't know what's, you know, going
8 to happen. Trade closings are just coming through. A lot
9 of -- FX stands for foreign exchange -- currency swaps, that
10 twenty to thirty billion our stuff closed out. They've lost
11 more than two -- again, I've heard -- my problem is what I
12 thought then and what I thought now. I've heard different
13 interpretations of these numbers. At the believe, at the time
14 when I was writing this I thought they've lost five to ten
15 percent of the corporates, lost three to five percent of their
16 pass-throughs. I've now learned my understanding may be
17 mistaken. But at the time I believe that's what I was writing.

18 He was trying to give me comfort that in fact they cut
19 a deal on the Lehman name, that we could actually use the
20 Lehman name in foreign jurisdictions, as I -- for two years, in
21 order to have the ability to liquidate. Again, my focus was,
22 what were the issues that would affect me -- me -- the estate
23 and my ability to maximize value for the estate going forward?
24 And he was pointing out that there was a deal vis-a-vis the
25 Lehman name.

1 I don't remember what "contract" stands for. It could
2 be a number, I think, I just don't remember. Your Honor, I can
3 guess, if you like, but I don't honestly fully remember. There
4 were a number of issues relating to contracts that would not
5 directly relate to the contracts in cure that Barclays was
6 taking.

7 And here was an important comment that, you know, no
8 resis. If you remember, in the asset purchase agreement, there
9 was this idea that Barclays was getting fifty percent of the
10 resis, we were getting fifty -- we were keeping fifty percent.
11 Now, he was telling me that no residential mortgages, I believe
12 he was saying, were being retained; that we need to include
13 residential mortgages to Barclays because of the loss of assets
14 and the deterioration of the market value of those assets, to
15 make them comfortable they were getting the balanced benefit of
16 the bargain transaction --

17 Q. What --

18 A. -- as I said -- I'm sorry?

19 Q. -- I'm just saying, what's the -- the handwriting is
20 hard -- the two words on the right, starts with a "P", under
21 that line, that curve?

22 A. I believe what it says is "position movement." The
23 positions are moving around and changing. He then said to me,
24 hey, we have 47.4 billion of assets against 45.5 billion of
25 liabilities, plus the cure and the employees is roughly 4

1 billion. So, you know, the estate is 2 billion dollars ahead.
2 I frankly, at this point, was thoroughly confused in a sense of
3 I wasn't sure, you know, the 20 to 30 billion, where it came
4 from; how the 47 just matched up with the 45.5 longs; and how
5 the resis fit in. And I'm not proud of this, but I was -- I
6 did get a little annoyed. And I did say to him, you know
7 something, you're talking to me -- you know, as if I know
8 what's going on in your head and is what deal you thought was
9 happening this morning and how it changed from last night. I
10 know what you told us last night. I know what the deal was
11 Wednesday and where we were Thursday. Can you just give it to
12 me simple?

13 And I turned the page and a little aggressively, he might
14 say -- obnoxiously said, just start from the beginning and go
15 to the end. What was filed on Wednesday, what has changed? I
16 don't want to hear about any interim things. I just want to
17 know what is different from what you told the judge, not from
18 where you thought you were going to be etcetera. I turned the
19 page, and at this point it was getting late. I had the
20 committee on hold, and I said to him, I just need to know where
21 we stand. We turned the page -- I turned the page, and I think
22 Mark Shapiro was on the phone at the time, I can't swear to
23 that, but Jim took a deep breath and said fine.

24 We had 72 billion dollars of assets and 68 billion of
25 liabilities as of what we told the judge, the way it was in the

1 contract. That's no longer true. We now have 47.4 billion of
2 assets and 45.5 billion of liabilities. These liabilities are
3 no longer third-party liabilities or shorts or derivatives,
4 these are now essentially money we owe Barclays. So we have a
5 net difference of assets to liabilities of 2.4 billion, in my
6 mind, matching up -- you know, all talking book value of
7 assets. The cure, it was 2.25 billion, it's now 2.25 billion.
8 I now know he misspoke. As Ms. Fife made clear to the Court,
9 it was really 1.75 or something like that, but it was -- you
10 know, he told me nothing had changed. Employee comp and
11 severance, no change, 2 billion, 2 billion. Goodwill, no
12 change, 250-250.

13 You can see, the center column are the issues I cared
14 about that I wanted him to tell me what changed. 745 Seventh
15 Avenue which was, you know, the headquarter building in Times
16 Square, essentially no change. New Jersey data, we thought it
17 was 450 -- I didn't write down the number, I don't know why, I
18 was probably writing the rest of my list of what I wanted to
19 ask him next, but we know it was 100 million change. Profit
20 sharing -- that was my shorthand for purchase price adjustment,
21 we talked about earlier. Yes, it was in the prior deal; no
22 it's not in the current deal.

23 DTC settlements -- this is some of the confusion from the
24 prior page. Before, Barclays was not helping us -- was not
25 guaranteeing or providing funds in order to allow for -- again,

1 this is my understanding -- that to the extent that customers
2 had trades within the broker dealer that had not closed prior
3 to our closing, DTC had raised issues regarding who was going
4 to guarantee those trades. And in business shorthand, Barclays
5 was not stepping to the plate or providing any comfort in the
6 old deal, now they were stepping up and solving that issue. I
7 found out later about negotiations around that issue, but as of
8 that afternoon, all I know is yes, Barclays was assuming the
9 liability or solving that issue.

10 Purchased assets. Were they taking more? Were they
11 grabbing more? Do I have to worry about the integrity of the
12 estate going forward? No, no, no. The PIM business, which
13 relates to those brokers, is in LB -- I honestly don't even
14 know what this is -- student -- I don't know, or LB Canada --
15 maybe that's LB Uruguay. That basically, there was some
16 entities they needed to take in order to get those assets, but
17 I shouldn't worry about them because they're not -- you know,
18 that's a technical issue as to who the employer is on some of
19 these brokers, but it didn't matter.

20 Yes, we now have a two-year license for Lehman -- again, I
21 don't remember if that was a change from the APA or an open
22 issue in the APA -- but again, part of my concern about going
23 forward business. For purposes of the IMD, business --
24 perpetual license to use the name, because, again, we needed to
25 make sure we had what to sell.

1 No sharing residential mortgages. They would not buy
2 Eagle Energy. I don't remember why this was a hot button, but
3 there were rumors in the marketplace that Barclays was stealing
4 Eagle Energy assets, and they confirmed that no Eagle Energy,
5 just like all the other Lehman private equity investments, was
6 not part of the sale; and also that the exchange-traded
7 derivatives were not being taken. All the derivative book and
8 all the over-the-counter exchange-traded derivatives were
9 remaining behind.

10 Q. Okay. Mr. Burian, just flip the page back to the
11 conversation where you said you got frustrated. At the top you
12 wrote "45.5 long," and I understood that to be the value of the
13 long positions, correct?

14 A. Yeah, my -- when I was scribbling this, I thought he was
15 talking about the broker-dealer book that was -- you know, that
16 was the more liquid book that was subject to the Fed -- the
17 federal government's repo transaction.

18 Q. Okay. And then two lines down, "loan is at 45.5." and
19 that would be the repurchase agreement or the Fed/Barclays
20 repo? Is that what you mean?

21 A. That is correct.

22 Q. Okay. So given your experience, you understand, don't
23 you, that typically repos have some cushion built into them?

24 A. I understand that when you lend money, you don't lend at a
25 hundred percent of value, you take what's called a haircut or a

1 cushion or a reserve on the assets being borrowed against or
2 lent against.

3 Q. Okay. Did it raise any issue with you at that time that
4 the long positions were valued by Lehman at exactly the amount
5 of the extended amount through the repo?

6 A. Well, as I said earlier, this whole conversation didn't
7 fully add up, which is why I got a little more aggressive and
8 demanded a more fuller explanation. But no, the idea of that,
9 what the fed government lent and which Barclays stepped into
10 the shoes of, didn't match what actually showed up at Lehman,
11 which did not surprise me in the least. Usually haircuts are
12 relatively modest, and frankly, with all of the -- what I was
13 told -- deterioration in the marketplace and loss of assets
14 that were included or not included, I would have been shocked,
15 frankly, if the loan did not exceed the assets.

16 Q. Okay. During the conversation, what did you understand
17 the basis of the valuation when the number was 47.4 versus 72
18 on the last page of your notes there?

19 A. Where there was a 45.5 on page 189 -- 190 or the 47.4 on
20 191, at all times, it was very clear to me they were being
21 provided to me in a manner consistent with every conversation
22 we'd had about the topic, which is, as a going concern, mark-
23 to-market, in a manner in which any reasonable broker-dealer
24 would do at the close of business of every single day.

25 Q. Did anyone tell you during that conversation that the

1 methodology had changed since they had reported to the Court or
2 filed the APA with the Court?

3 A. No.

4 Q. Did anyone tell you during that conversation that they
5 were ascribing liquidation values to arrive at that either 45.5
6 or 47.4 number?

7 A. At no time did anyone ever tell me that the deal had
8 changed and that we weren't getting going-concern value, but
9 there was a liquidation discount or liquidation methodology
10 being realized.

11 Q. And I believe you testified that you had the creditors'
12 committee on hold while you were trying to get this
13 information, correct?

14 A. Yes. People were very interested to find out what was
15 going to happen next, you know, hour or so, before the Court.

16 Q. So if Mr. Seery had told you that they were ascribing
17 liquidation values to the long positions, is that something
18 that would have mattered to you, or in your experience, to your
19 client?

20 A. It would have mattered very much. The client kept on
21 asking the question of, you know, value. And also, remember,
22 from the LBHI perspective, ignoring societal benefits and
23 ignoring that, you know, the Fed or someone else may have
24 wanted this to happen, and acknowledging that reduction in
25 claims, helping customers and all these things are very

1 important, as a fiduciary of LBHI and its debtors, excluding
2 LBI, the broker-dealer, we weren't getting much. And the idea
3 was we gained 250 million for the broker-dealer; we were
4 getting, you know, the buildings which we weren't all that
5 concerned would lose value precipitously.

6 The main essence that we were getting was the ability --
7 together with the broker-dealer -- was the ability to sell
8 these assets to a party who would be able to use them in the
9 ordinary course of business, who had a reason for wanting to
10 own them, who had cherry-picked and requested them, in a manner
11 that would allow us to avoid a liquidation and dumping those on
12 the market, which directly or indirectly, would have come back
13 to haunt us, whether because we were a creditor of the LBI
14 estate or because customers and third parties would have
15 guarantee or other claims against us.

16 So the idea was, the only way to maximize value for these
17 assets was ignoring whether we were happy with going-concern
18 market value on that date. One could argue selling them
19 earlier or later -- you know, that wasn't the decision that was
20 being made. The decision was, was it better or worse to risk
21 liquidation or to get the benefit of a going-concern sale and,
22 you know, again, your question was, would it have mattered? It
23 would have mattered enormously.

24 Q. So did anyone during that call with Mr. Seery and/or Mr.
25 Shapiro tell you that even when the number had been seventy-two

1 billion dollars, there had always been some pre-negotiated five
2 billion dollar discount for Barclays?

3 A. No.

4 Q. Did anyone tell you during that call that Barclays had
5 insisted on getting an immediate actual gain in the value of
6 the book?

7 A. No.

8 Q. Did they discuss during this call whether the changes that
9 had materialized since Wednesday to now Friday were favorable,
10 unfavorable, neutral?

11 A. Yes.

12 Q. And what did they tell you about that?

13 A. They told me again, it's the same story, that you can't
14 believe the complexity, you can't believe, you know, dealing
15 with, you know, JPMorgan, who they had not very kind words for
16 generally, and that we, you know -- they did it to us
17 prepetition, they're doing it to us again. We don't really
18 have control over what we're providing. Markets are moving
19 against us. People are closing us out. You know,
20 unfortunately, this is what we have.

21 I do believe, although -- everything I've told you,
22 absolutely firm recollection as if it was yesterday. This last
23 point I can't be positive about. I do believe that he also
24 told me at the time that they were having to scrounge for
25 assets and look for additional assets to make Barclays

1 comfortable, because with the volume of assets that were no
2 longer included, that were lost, taken, withheld, and with the
3 market price dropping, they had to include additional assets.
4 And that process was ongoing.

5 Q. There's been some testimony in this trial, Mr. Burian,
6 that given the tumultuous state of the markets, that market
7 value as of that period was actually converging with
8 liquidation value. Was that your understanding of that period,
9 you having lived through it as well?

10 A. No.

11 Q. What did you understand there to be a difference?

12 A. You know, later, as I'm sure you're going to ask me, we'll
13 talk about the assets in particular. But at the time, our
14 understanding was, this was the most liquid portion of the
15 Lehman book. These were the cherry-picked assets, the agency,
16 the Fed securities and other items. Clearly, if someone turns
17 around and says I'm going to sell fifty billion dollars of
18 assets in the next X period of time, any market would move and
19 there would be a discount applied to that market. But if
20 you're asking me whether or not someone can hold a portfolio, I
21 think twenty to twenty-five, twenty-seven billion of this were
22 government securities, agencies and other -- and the like,
23 anyone can say, if I'm going to hold these in the going-
24 concern, sell and buy, which is what broker-dealers do, over
25 the course of a reasonable period of time, would I have a

1 significant difference between the going concern value and
2 dumping it in the market? I would have expected to see a
3 significant difference and, you know, not the conversions.

4 And frankly, you know, at the time we're conversing,
5 governments and a lot of these securities hike on up in price.
6 There was a flight to quality. And I'm sure other experts will
7 testify about graphs and so on. But over the five days, Monday
8 through Friday of the fire-link, a lot of these assets had
9 ticked up in value. So we're talking about a time when I
10 didn't know what some of these assets were. We had the balance
11 sheet open before and we talked about some of the
12 categorizations that were there. I had no way of diligencing
13 or confirming our scrivener. I was trusting Jim and the rest
14 of the team that it is what it was.

15 Q. At this point in time, did you have a schedule of the
16 assets that comprised this 47.4 billion dollars of value?

17 A. No.

18 Q. Okay. What did you do after the call with Mr. Seery
19 and/or Mr. Shapiro?

20 A. I hope I gave a coherent review to the committee. Made a
21 few phone calls and ran around a bit and then ran down to court
22 to make sure I wasn't late.

23 Q. At that time, at the conclusion of the committee
24 conference call, prior to the sale hearing -- immediately prior
25 to the sale hearing, were you in a position to make a

1 recommendation to the committee as to the propriety of the sale
2 to Barclays?

3 A. I know that there's privilege issues, so I'm just going to
4 talk, and you'll stop me if I'm not saying the right thing.
5 But --

6 Q. I think at this point His Honor has stated he wants to
7 hear what the committee was doing, what the committee was
8 thinking.

9 MR. KIRPALANI: Mr. Burian has been deposed again,
10 Your Honor, on the basis of privileged information that we
11 gave. And I think for the most part he was able to answer most
12 of those questions without interruption.

13 A. Okay, I'll talk freely.

14 THE COURT: Please.

15 A. We were very upset. We were in a bind. I was a major
16 spokesman for Houlihan Lokey, giving advice to the committee.
17 I already said that I was embarrassed that all my years of
18 practice, there was a major transaction and I can't express a
19 view. I could tell you that we understand what's happening.
20 It seems to make sense. We do believe the company that there
21 is no viable alternative to buy as a going concern. We do
22 believe the company that 250 million for the broker-dealer is
23 better than getting nothing, no matter how difficult it is to
24 swallow that an engine that produced billions of profits and
25 continued to produce billions of profits, now for Barclays, was

1 being transferred.

2 I told them that there was no way of knowing whether
3 anything was going on on the real estate appraisals, but that
4 the company appeared to be on top of it. There appeared to be
5 a third party and that, you know, we have to assume that that
6 was fair. And on the securities, like it or not, our choices
7 were: try to blow this thing up and take the risk of
8 liquidation, keeping in mind that now we found out that
9 Barclays controlled the repo. My understanding of bankruptcy
10 law is that the automatic stay may not apply, so if we blew
11 this thing up and there was no transaction, Barclays could try
12 to grab those securities and then try to monetize their loan,
13 which is exactly the liquidation we were trying to avoid.

14 It was a very, very gutsy move to walk into this Court and
15 say we think now is a bad time to sell, you know, that we were
16 going to guess the market. And on balance, what we said was we
17 think that we should essentially allow this to happen, and we
18 should not consent, we should not decline, we shouldn't object.
19 We don't know enough to be able to say yes we agree, but we
20 knew enough to be able to say we can't in good faith stand up
21 and object. And therefore on balance, I was instructed,
22 Milbank was instructed to make it clear to the judge what
23 impairments we were operating under, to be diligent in trying
24 to make sure we understood and that we were protecting the
25 company to the extent we could, but not to take an aggressive

1 position against, but not to help the company much forward.

2 Q. Okay. If you had had what you deemed to be a sufficient
3 time to diligence the sale as it was represented to you, and if
4 you had concluded that what was represented to you was indeed
5 what was happening, would you have recommended to the committee
6 to support the sale?

7 A. That's a very, very tough question, because of the
8 hypothetical. It greatly concerned me, certainly in
9 retrospect, the fact that a large portion of the book should
10 have gone up in value not down. But remember, at the time,
11 there was a huge percentage of privates in there that we had no
12 idea, and I still don't know what the values are. So net-net-
13 net, it think our advice would have been yes, some of the
14 assets appear to have gone up in value, some of the assets
15 probably have gone down in value. We're not going to guess the
16 market. We're getting benefits here, including the benefit
17 that I mentioned earlier before the break, that we were told by
18 the estate that they were desperately short of cash and
19 therefore this was a way for avoiding the need for a DIP
20 financing, this was a way of protecting all sorts of other
21 assets, having the billion-plus in the real estate in this.
22 And I think that net-net-net, if what was described to us were
23 true, we -- and our diligence had confirmed it, we probably
24 would have supported the transaction.

25 Q. After your call with Mr. Seery and Mr. Shapiro, and after

1 your update to the committee, what did you do next?

2 A. Well, as I mentioned earlier, I essentially came down to
3 court.

4 Q. Do you recall a breakout session during the sale hearing
5 where the debtors' counsel updated the audience before the
6 hearing actually started?

7 A. Well, what happened was, my impression is, I basically was
8 informed by Mark Shapiro and by Jim Seery, you know, as things
9 were happening, in a phone call. It didn't take more than an
10 hour or so to get down to court. But most of the people had
11 been in court since earlier or were not given the opportunity
12 to get that update, including people that were integrally
13 involved in the transaction. When I got to court or shortly
14 thereafter, there was sort of a scrum. There were people
15 standing over here in front of the bench. And I believe Ms.
16 Fife was quickly walking through what she was about to inform
17 the court and what the modifications were to the transaction.

18 Q. And did Ms. Fife's comments to the audience seem to you to
19 be consistent with your conversation with Mr. Seery and Mr.
20 Shapiro?

21 A. Yeah. I don't want to sound too nerdy about it, but I was
22 standing there with my notebook in hand, and I had this list --
23 the last page of my notes with the before and after, and I was
24 sort of going through with my finger making sure it matched up.
25 I don't remember if Ms. Fife mentioned that the cure estimate

1 was now lower as she did later in court. I frankly don't think
2 she did. But basically, everything Jim and Mark told me --
3 well, she didn't go into as much detail like the PIM brokers
4 and all that stuff. The whole LB Canada thing wasn't
5 discussed. But everything else was reviewed by Ms. Fife with
6 the group.

7 Q. Was there any discussion by Ms. Fife of some substantial
8 disagreement between Lehman and Barclays over how aggressively
9 Lehman had been marking its book or anything like that?

10 A. No. She mentioned -- I believe she mentioned that value
11 had gone down; that they had to include -- I don't have a firm
12 recollection of whether she mentioned the 1.9 billion of box
13 assets, hammer and nails, whatever it's called. I don't
14 remember that exactly. But there was no conversation -- what
15 was the question again? Sorry.

16 Q. Whether there was any specific discussion about a
17 disagreement between Barclays and Lehman that necessitated
18 Lehman marking down its books to appease Barclays?

19 A. No, no, no, no. Not at all. There may have been a
20 conversation about the fact that there weren't enough assets to
21 give to Barclays. We may have to gross some up with some other
22 assets. But no conversation whatsoever about, you know, a
23 change in the valuation or a huge fight. Just that the market
24 value had gone down and the corpus of assets was no longer
25 available to be transferred.

1 Q. Did you have any discussions with anyone in the courtroom
2 about liquidation values or hypothetical liquidation values for
3 any of the assets?

4 A. No.

5 Q. What about with Lazard --

6 A. Whoa, whoa, whoa. There was a conversation about, you
7 know, as is typical in these sales, if you don't do this,
8 something else might happen, and the idea that a going-concern
9 sale is better than a disaster or liquidation. But nothing
10 about in this transaction we were moving to a liquidation sale.

11 Q. Did you have any discussions with Mr. Ridings in the
12 courtroom?

13 A. You know, Mr. Ridings -- Barry -- was there. He did pull
14 me aside during that and say, you know, the committee's got to
15 get on board or it's going to be a disaster. I'm telling you,
16 there's no one else out there who's going to buy these assets.
17 I don't want you to look at what a liquidation looks like. I'm
18 not exactly quoting. I'm trying to give the nature of the
19 conversation. I know Mr. Ridings a long time. We sort of
20 speak freely. It wasn't a stilted, formal conversation. It
21 was just, you know, the committee's got to be there for us.

22 And I don't remember if I told him or didn't tell him
23 exactly where the committee was, but I sort of gave him the
24 impression we're not going to do any harm. We may not help you
25 much.

1 Q. Did you stay for the entire hearing, Mr. Burian?

2 A. No. At some point I left. I stayed for, you know, a very
3 good portion of it.

4 Q. Did you stay long enough to hear the debtors' presentation
5 to the Court of the transaction that they were seeking approval
6 for?

7 A. I stayed all the way through the case in chief. I left
8 when some of the objectors were given their day in court.

9 Q. And was that presentation to the Court consistent with
10 your discussions with the Lehman representatives, Mr. Seery and
11 Mr. Shapiro?

12 A. Again, reading the transcript, I now see the differential
13 between the cure estimate. But other than that, it was
14 essentially the same. You know, market deterioration,
15 etcetera, etcetera.

16 Q. Okay, let's turn your attention, then, to the period
17 following the Court's entry of the sale order. Did you
18 participate in any way during the closing weekend?

19 A. I did, very much.

20 Q. And so what happened during the closing weekend? Can you
21 let us know your participation and involvement there?

22 A. Well, Saturday night I went to Weil Gotshal and spent a
23 lot of time there. I was there a good portion of the night.
24 Went home, showered and changed, and went back on Sunday, and
25 was there Sunday through three, four in the morning, and left

1 about a couple hours before, I'm told, the technical signing of
2 the agreements.

3 Q. Okay. So let's break it down. You mentioned you went
4 Saturday evening, obviously. But were other members of your
5 team there at Weil Gotshal during the day on Saturday?

6 A. Yes, they were.

7 Q. Did Houlihan request any further details on the assets
8 that were being transferred, when it arrived on Saturday?

9 A. I can't say exactly when we arrived on Saturday, but the
10 answer is yes, we were -- we asked -- like a broken record, as
11 you'll hear, throughout the weekend, we wanted to get a
12 breakdown of what exactly was going and how they were marked.

13 Q. And you viewed that as part of your job, is that right?

14 A. Yeah. The -- we wanted to keep up to date on what was
15 happening and make sure it fit within the court order and all
16 that stuff.

17 Q. What response did Houlihan get when it asked for this
18 information on Saturday?

19 A. We were told that things were worse than we even could
20 imagine. It was very, very difficult. The Friday -- Friday
21 was very disappointing in what assets showed up and didn't show
22 up. I don't remember if it was Saturday or Sunday, but the
23 comment of we need to send people down to DTC to find the
24 assets and figure out what's in our name and what's not in our
25 name. I remember joking about how do you go down and

1 physically count what is an electronic transfer, but no one
2 thought I was being funny. And we had the whole idea that we
3 honestly just don't know yet what was going on.

4 A lot of huffing and puffing about, you know, JPM forced
5 us into bankruptcy and now they're doing it to us again, and
6 that we just don't know what JPM is going to do. And a lot of
7 concern about DTC. And a lot of hoopla about, you know, are we
8 going to be able to close before the markets open. We'll get
9 to you when we get to you. We don't have a closing balance,
10 and when we do, you'll be the first to know.

11 Q. Did you participate in any of the negotiations or meetings
12 that were going on on Saturday between Barclays and Lehman?

13 A. Well, Saturday when I got there, no. No, we were in a
14 room on our own. We wandered around. But Saturday, to the
15 best of my knowledge, no participation in any negotiation
16 whatsoever. Just waiting around hoping to get information.

17 Q. Let me -- I'd like you to take a minute and just describe
18 what you understand the word participate to mean. I had filed
19 a brief in this Court, it talked about Houlihan being
20 intimately involved. There was a lot to say about that. Can
21 you just let the record be pretty clear, what was the extent of
22 Houlihan's involvement, the committee's involvement, Milbank's
23 involvement, in discussions, negotiations, etcetera, not just
24 Saturday, during the closing weekend?

25 A. Wow. How much time do I have?

1 Q. I'll stop you.

2 A. The place was very active. There must have been, I don't
3 know, ten, twenty, thirty, forty Weil Gotshal lawyers, people
4 all over the place. We were at best an annoyance, at worst
5 something else. We had the mantra of what's going on, tell us
6 what's going on. I don't ascribe negative, you know, motives,
7 but we were for the most part ignored and excluded from almost
8 every single substantive conversation, to the extent that, you
9 know, it got quite frustrating.

10 I recognize that we didn't support and that we took no
11 position. I recognize that, you know, we weren't a movant, but
12 we do our fiduciary duties, and we -- every once in a while I'd
13 catch someone in the hallway, in the bathroom, you know,
14 getting coffee, you know, what's going on? I'd see people
15 going back and forth. Very often we'd see the junior guys at
16 Lehman or Jim Seery huffing and puffing and running in and out,
17 hey, what happened, are you back from DTC? You back from JPM?
18 Informa -- you know, what's going on? But nothing like what I
19 am used to, which is the debtor sitting down and saying, okay,
20 committee, here's the list of the thirty issues we're worried
21 about; here's what Barclays is worried about; this is what's
22 going on; here's the positions we're taking. Nothing like that
23 whatsoever. I mean, at best, dropping off a draft of the
24 clarification letter, you know, go figure it out yourself.

25 Q. Just to be clear, because it's not always clear when

1 you're telling the story. To confirm, you're not ascribing any
2 ill will to anyone that they were treating you kind of like the
3 younger brother?

4 A. As you'll hear in a moment, I don't like being treated
5 that way, and I did get a little testy towards a later portion
6 of the evening and did assert myself. But here we are,
7 billions and billions trading hands on the most significant
8 event, you know, ever in bankruptcy, and it was very
9 frustrating and became frankly less and less believable that
10 they were closing at some period of time, and no one knew what
11 was being transferred. No one could describe to us what the
12 deal was. No one could describe to us what the huffing,
13 puffing, yelling and screaming and documents being traded and
14 conference calls were. You know, they had to be arguing about
15 something.

16 Now, we had, honestly, some inkling. I have long-term
17 relationships with many of the people that were there that
18 night and that day. You do pull people aside and say hey,
19 what's going on or where it is. But when you talk about as a
20 committee, being briefed, negotiating, participating, being
21 asked for input in these things, zero.

22 There was a time on Sunday where in one of the -- not long
23 narrow, but very large square rooms on the twenty-fifth floor,
24 there appeared to be the locus of operations. And you could
25 hear, you know, like the voice of God -- you hear people on the

1 conference call coming through the ceiling. And there were
2 many, many people in the room. And what would happen was,
3 people would gather. JPM seemed to be the focus with their
4 Wachtel lawyers and the rest. Michael Klein I was introduced
5 to at one point from Barclays and their whole team; Lehman,
6 different portions of their senior management team; the senior
7 people who were running the transaction on behalf of Weil,
8 would congregate there. There'd be a meeting behind closed
9 doors, and then they would break up and all go into other
10 conference rooms, have calls, shuttle diplomacy, and go back in
11 the room.

12 So it didn't take a genius to figure out that's where the
13 action is. So at one of the breaks in the meeting, being the
14 kind of person I am, without being invited, I walked in and sat
15 on the windowsill. And when they all filed back in, no one
16 asked me to leave. So I sat there. And they then had this
17 long conversation and debate. No one asked me my view. They
18 broke up again. And the next time they broke, I was a little
19 uncomfortable on the windowsill, I sat in someone's chair, you
20 know, moved up to the big boys' table and sat there for an hour
21 or two. They then got back together. And this was going on
22 for a little while where I was sort of eavesdropping on their
23 conversations. I mean, eavesdropping is a little on a stretch.
24 They knew who I was. But no one asked me to leave so I stayed.
25 Q. Were you able to glean what this big meeting was about?

1 A. Yeah. Basically, there appeared to the SEC on the phone,
2 they had governors on the phone, and all sorts of other people.
3 It appeared to be a huge fight about which Lehman had little to
4 do. At one point during one of the breaks one of the Lehman
5 people were like -- this doesn't really affect us any -- a big
6 fight between JPM, Barclays and DTC and maybe some other
7 authorities who are active in the transferring of securities
8 about what was transferred, where it was transferred, would it
9 be transferred.

10 It appeared to have two different components. One
11 component was Lehman assets that were either supposed to be in
12 the repo or out of the repo, that didn't make it over to where
13 it was supposed to be, and that JPM was refusing to give to
14 whoever was supposed to own it. And the other side of it was
15 non-Lehman assets that it either held in trust for others or
16 that was a trading asset -- trading issues, where there was a
17 trade put in by a customer on Wednesday and hadn't closed yet.
18 It was somewhere in this labyrinth of problems and someone had
19 to guarantee to somebody else on how it would close.

20 It was a very testy conversation. A couple of times
21 people would say things like, if this is going to close we have
22 to resolve it, you know, and all that stuff. But it didn't --
23 none of the issues that seemed to consume most of Sunday or at
24 least what I knew of, didn't really have any dollar and cents
25 impact on the Lehman estate. But I could be misunderstanding

1 those issues. I'm not an expert in them. I sat there as an
2 uninvited guest and I tried to listen carefully.

3 Q. Okay. I'd like, to turn your attention --

4 A. By the way, when I moved up to the table, I did run out
5 and ask Mike Fazio, and he, at one point joined and sat on the
6 windowsill. Maybe he also moved to the table at one point.
7 But you know, it was like during breaks of the meeting, we
8 tried to get better real estate.

9 Q. Gotcha. Turning you attention to the subject of --

10 A. But that's not the extent of our negotiation or
11 involvement. Obviously --

12 Q. We're going to talk about other meetings, you know, in a
13 minute.

14 A. Okay.

15 Q. But I just want to turn your attention for a moment to the
16 clarification letter itself. Were you -- was Houlihan aware
17 that there were ongoing discussions on a yet-to-be-finalized
18 clarification letter that weekend?

19 A. We got a draft on Saturday. I can't tell you we were
20 aware that people were negotiating it. We asked about it. We
21 said we'd like to be at a negotiation. I can't swear this,
22 because I wasn't part of it. The appearance was that Saturday
23 and Sunday were mostly consumed with figuring out what assets
24 were there and where were they going and all those issues. At
25 some point on Sunday real focus turned to, okay, now we know

1 there's a deal to be had, let's finish up this clarification
2 and negotiate it, because Tom Roberts was running around with a
3 markup. There seemed to be meetings about it. I know that at
4 one point in my presence someone said, listen, we need to
5 finalize our position; we're going to go in and have a meeting
6 with Barclays. And I asked if I could join; I was told no. So
7 obviously at some point on Sunday, they turned to the
8 clarification letter. But I can't tell you exactly when or how
9 focused it was. It revved up. Clearly it revved up later on
10 Sunday.

11 Q. More than anything, what I want you to tell the Court is,
12 was your understanding of the clarification letter that it was
13 designed to make substantive changes or plumbing changes to the
14 transaction that was described?

15 A. We were concerned about the former and hoped for the
16 latter in the sense of we understood the Court had made very,
17 very clear that the Court was around. If there were changes
18 come back. That the Court had even tied the hands of the
19 committee, that if the committee wanted to consent to
20 something, and I apologize, Your Honor, we didn't know what to
21 do with this -- it was sort of only we could consent to only
22 nonmaterial changes. So there was sort of very narrow leeway.
23 So the clarification, by its nature, I assumed, had to do with
24 how to ultimately achieve what was described to the Court. It
25 couldn't make material changes to the deal.

1 My view was, I didn't think the Court cared how Barclays
2 got what it got, you know, whether it was directly, indirectly,
3 but that what it got was important. That was a distinction I
4 made in my head. But my understanding of the clarification
5 letter was to confirm that. And by the way, there were
6 substantive changes that were described on the record that were
7 never papered over. And it was also my understanding that the
8 clarification letter was intended to do that as well, which was
9 to document, you know, the number of changes that were
10 described in court.

11 Q. Okay. I understand that -- appreciate describing all of
12 your efforts during the weekend, but I just want to fix it in
13 time a little bit more clearly so we can go a little slower on
14 a couple of meetings that we want to talk about. On Saturday,
15 how late did you and your team stay at Weil Gotshal?

16 A. We were doing nothing. I think -- at some point, I think,
17 three in the morning, two in the morning, four in the --
18 somewhere between two and four, I don't know exactly. It
19 was -- there was -- they weren't ready for us. It made no
20 sense to stay.

21 Q. What did you expect would happen when you returned on
22 Sunday?

23 A. I expected that there would be -- you know, we figured out
24 what we got. Here's a, you know, schedule that's going to be
25 attached to a purchase agreement and what they're getting.

1 We're going to make you comfortable as to what assets are being
2 transferred. I expected there would be a clarification letter
3 that was -- you know, had a list of issues that were -- that
4 would be described to us, and that if there were any open
5 issues, hopefully they were relatively narrow. And they would
6 tell us what the bid and ask was, or what the issues were. It
7 would be like every other significant transaction where there's
8 some -- at some point at least, there's order to the chaos, and
9 we would be treated like a committee should be, which is, as a
10 necessary evil, you know, to an appropriate functioning of a
11 bankruptcy case.

12 Q. I resent that, Mr. Burian.

13 A. Sorry?

14 Q. I resent that. What did in fact happen on Sunday morning.

15 A. I started to describe the fact that I hung around for a
16 long time and ate starchy foods. Sat down in that larger
17 meeting. Was briefed by Milbank about what a 15c3 account was,
18 because there was reference in the clarification letter, and I
19 honestly didn't even know what it was. Walked through the
20 letter with Milbank, spent some time doing that. The team had
21 a quick conversation with Jim Seery that we really had to get
22 the list of assets. And as you know, we did get a draft,
23 preliminary, old list of assets there.

24 Q. Let me stop you there, because I want to put it up on the
25 screen. Can you take a look in your binder --

1 MR. KIRPALANI: And if we can put it up. It's
2 Movants' Trial Exhibit 381.

3 Q. This is an e-mail from -- I think from someone at Weil
4 Gotshal to an associate at Milbank, 11:30 --

5 A. It's actually from Milbank.

6 Q. Oh, I'm sorry. It's from Milbank to Houlihan, is that
7 right?

8 A. Correct.

9 Q. Okay. 11:34 a.m. And the subject line is "BarCap". And
10 then if you turn the page to page 2, there's a summary page.

11 MR. KIRPALANI: Could you just blow that up?

12 Q. And then you don't have to turn to this on the screen, but
13 there seems to be a ream of paper behind that, it's double-
14 sided in these binders, which looks like backup to that
15 schedule. Is this the schedule that you were finally given on
16 Sunday?

17 A. I personally was not given this schedule. This was
18 e-mailed to us from Milbank, having been given it by Weil
19 Gotshal, of a list of assets that at some point in time was the
20 list that would be distributed to Barclays. The numbers were
21 marks as of some date between Monday and Friday.

22 Q. Okay. And did Houlihan do anything with this schedule on
23 Sunday after it had gotten it around 11:30 in the morning?

24 A. Well, Brad Geer buttonholed Jim Seery and said hey, we
25 just got this through Milbank. It says 49.9 -- it's 50 billion

1 dollars. You had told the judge 47.4, you know, of that -- if
2 this is supposed to be the repo stuff, that was only supposed
3 to be 45.5 billion. You know, what's going on? And he was
4 told, you know, whatever schedule you're looking at, it is what
5 it is. I can't tell you when the marks were. I'm not even
6 sure these are the assets that are going. We're still trying
7 to reconcile the books. You know, look, when we know, you'll
8 know.

9 Q. So --

10 A. And Mr. Geer -- again, I think I'm here not only for
11 myself but for Houlihan -- is that right?

12 Q. You can speak about your knowledge if you're the senior
13 most person --

14 A. To my knowledge --

15 Q. -- at Houlihan.

16 A. So, to my knowledge, the focus on that conversation was
17 more the issue with respect to the integrity, is this the
18 corpus of assets -- I'm sorry. The focus was more on things
19 have dropped in value and all the sorts of problems; less of an
20 emphasis on is it the corpus of assets. Remember, we were a
21 different side of the house. We're sitting in the rooms all
22 day, Sunday, at this time, knowing that huge disputes about
23 assets not showing up, and therefore the two of us put that one
24 together.

25 Q. And did you ask anyone back at your office to try and

1 start diligence in this schedule?

2 A. Well, here we are, it's sometime -- I mean, it's 11:30,
3 12:00 in the afternoon on Sunday. The largest asset purchase
4 agreement in bankruptcy ever is about to close. We don't know
5 what assets are going. We're told they've dropped tremendously
6 in value. So we did -- we didn't know if this was the assets,
7 but under instructions to do the best we can, we basically sent
8 out an APB and pulled in associates and analysts, and while I
9 know it sounds crazy, but we basically split this list up and
10 said to our associates and analysts go find out what we can
11 know about the value of these assets, you know, go CUSIP by
12 CUSIP. I mean, look at this list. Go CUSIP by CUSIP and just
13 find as many Bloomberg machines as you can. If you have to go
14 to Yahoo Finance, just plug it in and get the quotes. And try
15 to find someone to do an Excel spreadsheet to compare how the
16 quotes add up to these numbers. Maybe we could back in to when
17 this was marked as of, maybe we can get a feel for what things
18 dropped in value. Maybe we could actually get ahead of the
19 curve for a change and not be behind the curve. Now, to be
20 honest, I didn't know how complicated this was when I said all
21 this stuff, sent the associates to work, but the goal was what
22 can we fathom from these documents.

23 Q. And did you ultimately get any feedback from your team?

24 A. Again, I was doing a lot of other things at the time, but
25 the team did get feedback which was then related to me in

1 summary fashion.

2 Q. And what did they relate to you?

3 A. Well, what was related to me is, as we would have
4 expected, a lot of these assets were the cherry-picked, most
5 liquid, broker/dealer assets that would be used in the ordinary
6 course of business. These were the assets that a large portion
7 of them -- like, if you look at the schedule, the twenty-eight
8 and a half billion called Fed collateral, a lot of that were
9 agencies, government securities, which in fact, given enough
10 time, you can find quotes for.

11 There was a large portion of assets for which we had no
12 idea -- I mean, in retrospect, you know, there are numbers here
13 and CUSIP numbers we couldn't find anything about. I mean,
14 virtually -- for instance, one of them turns out to be a senior
15 note in the Pine structure vehicle which I now know too much
16 about, but at that point in time Pine to me was a tree. You
17 know, there was no knowledge. And that in fact if you grouped
18 them into different areas I believe the groupings were agencies
19 and federal securities like T-bills, and you grouped them in
20 corporate so we can get quick quotes on.

21 Net, net, net, it looked like one category went down
22 roughly 300 million in value. If you look at the three days
23 from Wednesday to Friday, for the other category it had gone up
24 400 million in value. So net, net, net, of the assets that we
25 could value, it wasn't perfect, not exact, done by essentially

1 kids doing the best they could in a very limited time, it
2 looked like the assets had gone up 100 million bucks.

3 No firm conclusion as to what date these were marked as
4 of. It appeared that the marks didn't correlate to any
5 specific date which, by the way, didn't surprise us, in light
6 of the -- you know, the description in the document was hey,
7 here's a list that was pulled together. It may or may not be
8 accurate, you know, we're not sure what date it's through.

9 Q. So at that time even though you were diligencing (sic)
10 this list, just so that the record's clear, you weren't sure
11 that this in fact is the list of securities that's going over?

12 A. I was neither sure that it was the list of the securities
13 nor did I have any real idea of what the true value was because
14 a large portion of the securities were impossible to find
15 quotes on --

16 Q. Okay.

17 A. -- through our limited systems.

18 Q. Okay. You mentioned a few minutes ago the 15c3 lesson
19 that you got. And I think you also mentioned that that wasn't
20 the only meeting you attended or that wasn't the only
21 negotiation that you had some role in. Did there come a time
22 when you had a role in the negotiation over the 15c3 issue?

23 A. Yeah. I mean, time is passing, it's getting later. I
24 found out this information somewhere between 11:30 at night and
25 1 o'clock in the morning, you know, the idea that what we

1 couldn't value was -- may have been worth more. I'm getting a
2 little more agitated as time goes on. I mean, things are
3 moving on and I'm, like, stomping around trying to find someone
4 to talk to me.

5 And I passed by a group of people standing by, I don't
6 know, the secretary's station outside of one of the conference
7 rooms, 25b or c -- c or d, on the Weil Gotshal conference
8 floor. And Harvey Miller was there, Tom Roberts was there.
9 And I basically picked up a conversation about we really got to
10 solve the regulatory capital issue, 15c3 issue.

11 I'm not exactly shy. I sort of poke into the middle and
12 say, "Hey, what's going on there?" And they go, "Oh, Barclays
13 is giving us a big headache. They're threatening to close.
14 You know, they're concerned about the amount of transactions,
15 and we're going to have to compromise on this issue." And I
16 was, like, yeah, I don't want to give -- when you say
17 participate or negotiate, we're not, like, sitting in chairs,
18 you know, "What do you think?". We are literally standing by a
19 printer where I happened to walk by.

20 And I say, "Well, what's the issue?" And they say this
21 and that. And I say, "Wait a minute, Milbank had told me about
22 this. It doesn't make any sense to me. I mean, a deposit's a
23 deposit. Cash is cash. What's the ambiguity? You can't let
24 Barclays just push you around." Hey, in my role as the
25 committee I'm supposed to give the debtor backbone in dealing

1 with third parties who want to take advantage. And at which
2 point in time, I think it was Tom Rob -- I'm pretty sure it was
3 Tom Roberts said to me -- well, not in that conversation, that
4 comes later.

5 In that conversation I think it was more or less left that
6 I basically said to them "Enough is enough. You know and I
7 know they're going to close. They're not going to walk away.
8 Egg is on their face as much as ours. You've got to be firm on
9 these issues. Whatever the issues are you've got to be firm.
10 On this one it looks even more clear. There are securities
11 there but it's also cash. Cash is cash as defined. Lori told
12 the judge -- Ms. Fife told the judge no cash is going. Just
13 tell them no."

14 A little later on I believe Tom Roberts came up to me and
15 said, "We've really thought about this issue. It's 2.2, 2.3
16 billion. We're going to split the baby and make this issue go
17 away."

18 Q. I'm sorry, 2.2, 2.3 billion, that's the cash?

19 A. No, 2.2 to 2.3 billion of total assets, roughly 760
20 million of which were securities, the balance were in cash.
21 Tom -- again, this is all hallway talk -- you know, we're
22 negotiating the letter now and we're going to recommend that
23 we -- I don't remember if he said we're going to offer or we
24 have offered that we're going to split the issue, they'll get
25 roughly 1.1, we'll get 1.1 billion dollars of value. And you

1 know, in light of the ambiguity, you know, that's fair.

2 Q. What was your reaction to that.

3 A. I -- I went a little ballistic. Well, ballistic is too
4 much, I'll save that for later in the evening. I got agitated.
5 I basically got on my high horse and said to him, "You know
6 something Tom, when you're talking about billions, fifty-fifty
7 splits and splitting the baby just doesn't cut it. We're
8 talking about hundreds and hundreds of millions of dollars, and
9 you don't just say there's ambiguity in the document, golly,
10 gee whiz, you know, it could be this, it could be that, we'll
11 split it. That's a billion dollars." In retrospect I probably
12 shouldn't have said the next phrase, but I also said to him, "I
13 could understand if you really think there's ambiguity, in
14 splitting the securities or even giving them the securities,
15 but how do you settle a black and white issue on cash? Is
16 there any word more clear than cash? You know, what are you
17 doing? What are you doing?"

18 Q. And what was Mr. Roberts' reaction to that?

19 A. He was exasperated with me. I think he confirmed his
20 judgment to probably leave us out of all the negotiations of
21 the clarification letter over the last day or so. I think he
22 felt that, you know, I don't really understand or I don't
23 appreciate the pressure they're under. Tom is a very good
24 lawyer and I think he felt that sometimes in life you've got
25 compromise issues and move on and there's a greater good and I

1 was being narrow or didactic. But at the same time I represent
2 a committee, I've had input into one issue and on that one
3 issue we seemed to be right. And I made it very clear to him I
4 thought they were being weak-kneed about the whole thing and,
5 you know, they shouldn't be going into the view of just because
6 Barclays raises an issue you split the baby. I actually
7 somewhat obnoxiously said to him, "What else are you
8 splitting?" But that didn't get a response.

9 Q. And did anyone from Lehman or Weil tell you that night how
10 the issue was going to be resolved or how it was ultimately
11 resolved?

12 A. No. I -- again, maybe they did and maybe they didn't. I
13 have no recollection of ever being included in any other
14 conversation about these issues. I don't know how you want to
15 call the morning, but later on about 6, 7, 8, 9 in the morning
16 I did get on my BlackBerry a -- I don't remember if it was a
17 PDF of the clarification letter or someone at Milbank typed for
18 me that paragraph and e-mailed it to me, but it sounds like
19 they went back and fought with Barclays about the issue and in
20 fact had a deal that on the 15c3 issues, when that money gets
21 released, Barclays would get the securities and we would keep
22 all the cash. It's not an insignificant benefit to the estate
23 and I did take a little credit in that savings. But you know,
24 that was the first time I can recollect hearing about the
25 issue.

1 Q. Okay. Turning back now to the issue of having your team
2 try to make sense of the schedules of the assets that were
3 going to be transferred. You testified that the schedule you
4 got at around 11:30 in the morning on Sunday was clearly not
5 the final schedule or the precise schedule. You did with it
6 what you could, but did you let anyone at Lehman know that
7 there's some deadline under which you're operating that you
8 need to see something by any particular time that day?

9 A. We had a very active committee. We have Japanese
10 participants, time zone issue, drive you nuts. We went to
11 Lehman, you know, Harvey Miller, in particular and Lori and
12 others quite often and said we're running out of time. If
13 there's anything you need from the committee you've got to tell
14 us.

15 And we had, I think, a committee call scheduled at 12. It
16 got bumped to 2, it bumped to 4, it bumped to 6, bumped to 8.
17 I think we even had a committee call at 11 or 11:30 which was
18 already was the next -- don't get me on time zones. And we
19 said, "It's Sunday night, this is beyond rude, if there's
20 something you need from us we need to know."

21 And at some point before the last call I went to them and
22 said to them, "You know, we're not going to have another call
23 at 2 in the morning. There really is very little we can do.
24 You don't seem to need us for anything. If there is something
25 you want us to go to the committee on, you need to tell us."

1 Okay. And they were, like, "Do what you can. I'm assuming you
2 have phone numbers for your co-chairs, you know, if people
3 aren't available they're not available."

4 Q. And so did you participate in a committee conference call
5 that Sunday night?

6 A. I did.

7 Q. Okay. And what was --

8 A. Well, Monday morning at that point.

9 Q. Yes. What was the purpose of that call?

10 A. You know, it wasn't a very pretty call. We knew less than
11 we thought we knew on Friday. We discussed with them the fact
12 that we were extremely concerned about the split of the
13 residential mortgages. You may remember that Ms. Fife informed
14 the judge that there was going to be -- some residences were in
15 the deal, some residences were out of the deal. Mr. Hirshon
16 stood up at the meeting and spoke about how some of the
17 residences were going into the DTCC but then they would come
18 back to the estate if trading liabilities were worth less.

19 I had no update as to exactly where that deal was being
20 cut. We explained to the committee that we had a five billion
21 dollar issue that we can't account for, that we have marks as
22 of a certain date. We have no -- we can't advise them that in
23 fact the market value on the issues that we have done. We
24 described to them the somewhat haphazard exercise we went
25 under, the results of which were just coming in after 11

1 o'clock at night and that was the best we can do and that we
2 were waiting for an explanation from the debtor with respect to
3 and the privates and the assets really moving over.

4 I did pooh-pooh the issue and say things like, sure,
5 there's an explanation that these assets are not the assets and
6 that, you know, we'll find market value moves in the assets we
7 have not been able to value. There was -- we talked about the
8 regulatory capital issues, and in fact that we were, you know,
9 exercised about them and thought that here were assets that we
10 didn't know we had but that technically we believe we should
11 get and that we were trying to give the debtor strength to just
12 say no. So we talked about those three issues. We probably
13 talked about all sorts of other issues.

14 There was a big conversation about what could we possibly
15 do and the answer was nothing, we have to wait and see what
16 they do, I'm sure they're going to come back to us and tell us
17 what's going on, and we'll just do the best we can. I think we
18 scheduled a meeting with the committee for 10 o'clock the next
19 morning. And I'm sure some committee members said call me any
20 time and wake me up and other committee members said, you know,
21 I'm done with this. It really was not a very satisfying call.

22 Q. And were you able to get any instructions or authority
23 from the committee to consent to the transaction as you
24 understood it at that point?

25 A. Very direct and significant conversations. We were

1 informed directly and bluntly that we were to observe, we were
2 to participate, we were not to consent. We are not advising
3 the committee that we had any ability or knowledge base to
4 consent. We had taken no position of authority at the hearing
5 other than we had asked for an adjournment and that nothing
6 material had changed in that time frame and that we had no
7 ability to exercise discretion and all of a sudden support or
8 approve.

9 Q. Okay. So after the committee conference call on Sunday
10 night did you make any further efforts with Lehman or Barclays
11 to get information about the assets being conveyed?

12 A. Well again, at some point during this we had a whole 15c3
13 conversation, but as time went on and I hear guys from my team
14 telling me, "Oh my God, you know, we've got to get an
15 explanation of this." I'm hearing that they're trying to
16 resolve the clarification issues to proceed to a closing. It
17 just becomes, you know, impossible to believe that people don't
18 know what they're transferring. I mean, at some point you have
19 to resolve the JPM issue. At some point DTC knows a lot of
20 money is changing hands. Although it could be it doesn't
21 matter what the assets are, Barclays is closing and moving on
22 and taking a loss. But no one had said that to me. So at one
23 point in time I started getting very, very agitated that things
24 were happening and I had no way to explain any of it to my
25 committee.

1 Q. About what time was this?

2 A. Sometime between 1 and 3 in the morning.

3 Q. Okay. And so what did you do?

4 A. Besides stomping around and getting coffee and, you know,
5 complaining loudly to anyone who would have listened to me, the
6 most effective thing I did was again I walked up to the area
7 outside of the conference rooms where the clarification letter
8 was being negotiated. I waited for people to come in and out.
9 At one point Harvey was standing there. I think Lori was
10 standing there, Tom Roberts was there, Michael Klein was there
11 talking to his client.

12 And I pulled Harvey's elbow and said, "This is ridiculous.
13 You're telling me you're about to close the largest transaction
14 ever and you don't even know what you're transferring and that
15 you're too busy to tell the committee what you're doing? Don't
16 you think, Harvey, maybe you know what's going on? Maybe not.
17 Don't you think at least you should get an explanation and I
18 can listen and hear it? We've got to talk about" -- I didn't
19 use these exact words, but in a very agitated aggressive
20 manner, it's time to tell us where we are. If you're not done,
21 fine, I need to know where we are.

22 Q. And what did Mr. Miller do?

23 A. You know, I think Harvey had some sympathy. He sort of
24 turned to me and said wait here a minute, you know, we're going
25 to get you an answer. And he walked four, five, six feet over

1 and sort of yanked at Michael Klein's shoulder and sort of
2 whispered in his ear pointing at me, at which point they all
3 motioned to me, move into a conference room.

4 Q. And I'd actually like to ask you to refer to Movants'
5 Exhibit 410 in your binder.

6 THE COURT: It's just about the time that we would
7 ordinarily take an afternoon break, so maybe we can make this
8 the transition point --

9 MR. KIRPALANI: Of course.

10 THE COURT: -- and take ten minutes. We're adjourned.

11 (Recess from 3:34 p.m. until 3:47 p.m.)

12 THE COURT: Be seated, please.

13 MR. KIRPALANI: Mr. Burian --

14 THE COURT: Just for planning purposes, I need to
15 break today at about 5:20--

16 MR. KIRPALANI: Okay.

17 THE COURT: -- so hopefully we'll be able to at least
18 conclude the direct that we're in the middle of now.

19 MR. KIRPALANI: That's my expectation.

20 THE COURT: Great.

21 RESUME DIRECT EXAMINATION

22 BY MR. KIRPALANI:

23 Q. Mr. Burian, you were mentioning the meeting -- just to
24 give some context -- with Mr. Miller and he went and got Mr.
25 Klein to talk with you and you went into a conference room. I

1 was asking you to take a look at Movants' Exhibit 410 in your
2 binder.

3 MR. KIRPALANI: Put it on the screen. Actually, Your
4 Honor, this is the original manila folder that's been talked
5 about a lot. If it's okay with --

6 THE COURT: Oh, I'd love to see it.

7 MR. KIRPALANI: -- the parties, I'd like to mark it
8 as -- I've been carrying it around for a year wondering what to
9 do with it. I'd finally like to just --

10 THE WITNESS: Could we go off the record for a second?

11 MR. KIRPALANI: -- give it to someone else. May I
12 approach, Your Honor?

13 THE COURT: You may, but Mr. Burian has asked to go
14 off the record.

15 MR. KIRPALANI: This isn't a deposition, Mr. Burian.

16 THE WITNESS: I was promised the original back if you
17 can bring it to my office at some point.

18 THE COURT: All right. Fine.

19 MR. KIRPALANI: Okay.

20 THE WITNESS: Thank you.

21 THE COURT: And it will later appear on eBay perhaps.

22 UNIDENTIFIED SPEAKER: It will have one bidder.

23 (Movants' Exhibit 410A, manila folder, was hereby marked for
24 identification as of this date.)

25 MR. KIRPALANI: So we've marked that 410A.

1 THE COURT: Okay. Shall I give it to --

2 MR. KIRPALANI: It was 410 --

3 THE COURT: Shall I give it to Mr. Burian?

4 MR. KIRPALANI: I think you can keep it. He has the
5 copy. I think he's familiar enough --

6 THE COURT: Okay. This can be --

7 MR. KIRPALANI: -- with the copy. That'll be our
8 original --

9 THE COURT: This can be up here just for a minute.

10 BY MR. KIRPALANI:

11 Q. Can you walk through what you recall being discussed in
12 the meeting with Mr. Klein and Mr. Miller, and to the extent it
13 helps to refer to Exhibit 410, feel free to do so.

14 A. It was a very rushed conversation. It was clear that Mr.
15 Klein was being put upon to have to explain the transaction to
16 us. Harvey clearly had pulled him into the room and said
17 "You've got to do this." I was sitting there, Mike Fazio was
18 to my left, Lori Fife at the head of the table on the right, I
19 believe, though she wasn't there the whole time. Mr. Klein,
20 half sitting, half standing, was caddy corner on the corner.
21 Harvey Miller was across from me and Tom Roberts was to his
22 right, to my left.

23 And Mr. Klein basically started talking. He understood
24 the purpose of the meeting, obviously. And he grabbed from the
25 credenza or from somewhere on the table a manila folder, turned

1 it over with a marker, I believe, or a pen, and starts
2 scribbling. And he said, "Listen, this is where we are and
3 this is what the transaction is. We've had all these problems
4 with DTC and with JPMorgan, but it's really not that
5 complicated."

6 I'm not giving you exact quotes but I'm trying to give you
7 tonality and sort of, you know, a feel for the room. He said
8 to me, you know, "This is where we are. Originally it was
9 seventy-two million -- billion against sixty-eight billion and
10 that's no longer true. We thought we were getting pre-mark at
11 49.9" Actually, it may be 49.4, now that I look at it --
12 roughly fifty billion dollars pre-mark. Pre-mark, it was clear
13 in the room was old value. Post-mark, we're sitting here
14 today, post-mark they are now worth forty-four to forty-five
15 billion dollars. You know, differences of view about this
16 stuff but Barclays is going to accept forty-five billion.
17 They'll cut us a break, forty-five billion of value, add the
18 box securities which was the additional securities that was
19 going around and voila it's 1.9 billion.

20 So all in -- actually, can I make a comment? Everything
21 on this page is Mr. Klein except for that little box where it
22 looks like it says "Regis" but it really says "resis" and
23 there's a 2.5 and a 3.5. That's my chicken scratch.

24 Q. Okay.

25 A. When I go through this you'll see the difference. So all

1 in we're closing, we're getting 47 billion of assets and the
2 Fed liability's 45.5. Now I know it was only 45, but it's
3 45.5. We're taking on extra liabilities and carrying over the
4 same mistake everyone was making with respect to the cure
5 payments of 4.25 and you know, you guys are now selling 47
6 billion of assets for 49 plus -- 49 and a half billion of
7 liabilities, and net, net, net, ignoring the fact that we are
8 accepting 45 billion and not 44 billion, you guys are doing two
9 plus billion better than you ever thought and you should be
10 thanking us and not causing trouble. I mean, essentially the
11 conversation, in other words. You see these two lines across
12 the --

13 Q. Yeah.

14 A. He used that to denote -- he goes, "Okay, that is the
15 transaction that is closing. All that's been going on here is
16 figuring out how to get there."

17 Q. Okay.

18 A. One --

19 Q. Just so the record's clear because it's hard to sometimes
20 follow with the two lines. In the center of the exhibit there
21 are two horizontal lines, and you're referring to the top of
22 the -- what's above that double line versus what's below that
23 double line, is that correct?

24 A. Correct.

25 Q. Okay.

1 A. The top above the double line was viewed as, "Let me tell
2 you the substantive impact of what we're getting and what we're
3 not getting." And below the line was, "Let me explain to you
4 what this whole weekend has been about and the complexity of
5 how we're getting it."

6 Q. Okay. And so what did you understand the below the --
7 actually, before I get to below the line, what's the resis box
8 that you testified is your handwriting?

9 A. That came after -- you want it chronologically or you want
10 me to just jump there. I mean, this was -- I took this folder
11 from him. Later on you'll hear that we tried to ask some
12 questions. One of my about the resis and I jotted a note down
13 about his answer.

14 Q. Okay. No, sorry then, stay with it the way you feel it's
15 most relatable. Did you discuss what's below the line then?

16 A. Again, this is more of a monologue than a conversation,
17 but Mr. Klein then said to me, "Okay, how are we getting the
18 pre-mark fifty billion dollars of assets? Well, Friday we got
19 forty-one to forty-two billion transfers from BarCap to JPM --
20 to BarCap from JPM but eight and a half billion was held up.
21 We got -- on the 8 and a half billion we got about 7.4 billion
22 of cash." If you remember, on this big schedule there's 7
23 billion of cash listed. "And what we're going to do is somehow
24 or another we're going to reverse that trade and ultimately the
25 goal is we're going to get those securities back and we're

1 going to give them, you know, their cash back," or something to
2 that effect. The plumbing issues just weren't all that
3 interesting to me.

4 Q. Okay. Staying on top, now, of the double lien, the
5 substantive issues, as you described them. Did you ask any
6 questions regarding pre-mark, post-mark, as of when, what
7 methodology, anything about that?

8 A. The meaning was obvious in the room. I mean, he said pre-
9 mark. We're talking about Lehman's books and records. The 49
10 point whatever billion was pre-mark, post-mark. I mean, mark
11 means -- you know, a broker/dealer, my understanding, has a
12 clear understanding of what mark means. You know, going
13 concern, mark to market in a manner in which every other
14 broker/dealer might market a book. It's not -- there was no
15 specific conversation other than the fact that Barclays had an
16 issue between -- it could be between forty-four and forty-five
17 and was giving us the benefit of the doubt and making it forty-
18 five.

19 Q. Okay. And can you just --

20 A. But there was no discussion about the manner.

21 Q. But can you just refer back to Movants' Exhibit 381.

22 MR. KIRPALANI: Can we get that on the screen? If you
23 can flip the page to the second page of this exhibit and
24 enlarge that.

25 Q. So was it your understanding that this was the 49.9 pre-

1 mark number, that it coincided with that?

2 A. Not necessarily. My suspicion, but frankly I had no way
3 of knowing if that was or wasn't, you know, what exactly --
4 what corporates of assets were showing up after all the weekend
5 events. I didn't have any clear understanding of --

6 Q. Did you ask --

7 MR. KIRPALANI: We can go back to Exhibit 410.

8 Q. Did you ask Mr. Klein, or did Mr. Fazio ask Mr. Klein when
9 this decline in market value occurred?

10 A. In a more leading way than that. I mean, Mike jumped in
11 and said, "Wait a minute, what's going on here? Some of these
12 government security issues have gone up in value." Like, what
13 do you mean pre-mark and post-mark, you know, the market has
14 dropped?

15 Q. And what did either Mr. Klein or Mr. Miller -- what did
16 anybody say to you?

17 A. Mr. Klein sort of made a face, you know, as if do we not
18 understand what's going on in the world, you know. But I don't
19 know what he was really thinking. Harvey jumped in and said,
20 "We're here to tell you what the deal is that we're closing.
21 We're not here" -- I don't remember his exact words, but
22 basically, "You can get whatever information you want, we're
23 not here to answer your questions." You know, it is what it
24 is. But we raised the issue and I'm positive that Mr. Klein
25 several times during that meeting used the word "market value".

1 Q. Was there any mention during that meeting of Lehman or
2 Barclays using the liquidation value or a hypothetical
3 liquidation value to arrive at this post-mark number?

4 A. Absolutely not.

5 Q. Was there any discussion of agreeing to the forty-four or
6 forty-five billion dollar post-mark value in order to
7 facilitate a day one gain to Barclays?

8 A. No, the word "agreement" did come up in the sense that
9 they said, "We've agreed that we're going to round it up to
10 forty-five." But in a context there was no discussion of any
11 of the other items you mentioned.

12 Q. So how did you respond to all of this?

13 A. The information I'm getting does coincide or foot with
14 some of the information that I received. I had no way of
15 diligencing this. Michael Klein got up and was actually
16 standing at the time anyway and he left the room pretty
17 quickly. Harvey had to go around the table and across to leave
18 the room. And I stood up and I turned to Harvey Miller and
19 said, "There's nothing I can do about this, there's no
20 diligence, you know, I've got to trust you on this."

21 Q. Okay. And staying away from what's below the double line,
22 staying away from the plumbing for a moment --

23 A. Oh, wait, I'm sorry --

24 Q. Um-hum.

25 A. -- it's not true. I did ask a question and got one

1 answer.

2 Q. Okay.

3 A. Mike Fazio jumped in after me, and that was the resis
4 thing that I mentioned earlier. I'm sorry.

5 Q. No, so go ahead, just tell the Court about that.

6 A. Yeah, as I mentioned earlier, one of the committee issues
7 is what's happening with the roughly six billion or resis,
8 who's getting them, who's not? I said, "Okay, are these
9 numbers net or gross? You know, are they including the resis,
10 not including the resis? Who's getting the resis?" You know,
11 I probably didn't say all that. I probably said, "What's up
12 with the resis?" or something equally intelligent. And what
13 Mr. Klein said to me is, "It's very simple. Barclays is
14 getting two and a half billion of the resis and that's already
15 in the forty-five billion dollar number. You are getting three
16 and a half, but that three and a half is going to DTC. If they
17 have liabilities they'll take it from there. If they don't
18 have liabilities you'll get them back." And that's why I sort
19 of straddled there and put two and a half on the left and three
20 and a half on the right.

21 Q. Okay.

22 A. Again, that's the only time that my writing appears on
23 this piece of paper.

24 Q. All right. So just moving along, avoiding what's below
25 the double line for a minute and just focusing on what you

1 testified was the substance of the changes, substance of the
2 transaction, at that time did you understand this transaction
3 to be basically the transaction that was described to the
4 Court?

5 A. Yeah. I mean, there are some rounded things, 47.4 versus
6 47 but he was speaking quickly and I'm sure it was -- you know,
7 it was rounding. But essentially this is very, very similar to
8 what Jim Seery told me before the court hearing, very similar
9 to what Lori briefed people, you know, in a little scrum before
10 the hearing started, and you know, very similar to what Weil
11 Gotshal represented to the Court would be the transaction. And
12 it made sense -- now, this does not include 15c3, all the other
13 issues that were being separately negotiated, but on this
14 topic, other than the plumbing of how it got effectuated, this
15 is, you know, pretty close or dead on to what we were -- I was
16 expecting to hear.

17 Q. Okay. And how did the meeting with Mr. Klein end?

18 A. Well, he walked out and I then made the comment to Harvey,
19 admittedly somewhat thankful to him, you know, "Thank you for
20 doing this, but what am I supposed to do with this
21 information?" Remember this is on the heels -- the meeting
22 broke up after Mike Fazio, I'm sure in their view, rudely said
23 something like, "How could have market value dropped in light
24 of the fact that some of the governments had gone up?", which
25 they refused to answer and Harvey broke up the meeting. They

1 had other things to do. I turned to him and said, "There's
2 nothing I can do about this. It is what it is. I've got to
3 trust you on this."

4 Q. Did you advise Mr. Miller that you were accepting Mr.
5 Klein's representations or his representations or --

6 A. Accepting in the sense of I hear it, I understand it,
7 you're closing on that basis, yes. Accepting in that that's
8 the final word? No, we told them that we'll reconcile
9 afterwards and get printouts to these numbers.

10 Q. At any point, Mr. Burian, during this discussion, did you
11 think about going back to the judge to explain the changes that
12 were just described to you?

13 A. No. I mean, any point during the evening or any point
14 after hearing this?

15 Q. Well, first, with respect to this -- this particular
16 conversation.

17 A. This was -- I was relieved to hear this. I kind of turned
18 to other people around and said, "You see, there's no problem."

19 Q. And what about at other points in the evening, was there
20 anything that you witnessed or that you observed that caused
21 you to think about perhaps going back to the judge?

22 A. I wondered aloud at the time whether or not the
23 clarification letter was a clarification or modifications, you
24 know, what was going on there. I didn't understand enough
25 about some of the disputes to make a decision, but we did

1 wonder whether they were really going to close before the
2 market opened or present a letter to the judge, and as people
3 have heard I had a quick conversation with Harvey about the
4 topic -- Mr. Miller, sorry, about the topic, but other than
5 that, no.

6 Q. What was the substance of that conversation with Mr.
7 Miller?

8 A. You know, you're standing in the hallway, you have this
9 feeling of majesty of the moment and you're making history, and
10 everyone's running around and there's not much for me to do.
11 And I found myself standing next to Mr. Miller. It's already
12 late. We have no committee anymore. I've got this explanation
13 tucked away in the manila envelope in my briefcase. And I
14 turned to Mr. Miller and said, "Do you need us? Do you need
15 me?" And he, partly in jest, partly seriously said, "You know,
16 Saul, I never need you." And I said, "Okay." You know, and
17 again, we're looking at a long hallway at Weil Gotshal with
18 lawyers running in and out of conference rooms. And I said to
19 him, "Are you okay with all this?" He said, "Yeah, I'm fine.
20 We're closing before the market opens." And I said, "If that's
21 okay with you it's okay with me." And that's --

22 Q. What did you mean by that statement?

23 A. It was clear from the context that what I was saying --

24 MR. BOIES: Objection, Your Honor.

25 THE COURT: What's the objection?

1 MR. BOIES: This is unexpressed intent.

2 THE COURT: This is what?

3 MR. BOIES: The unexpressed intent, subjective intent,
4 what did you mean by that?

5 THE COURT: Well, that was my overruling of what you
6 were trying to do this morning.

7 MR. BOIES: Right, exactly.

8 THE COURT: This has been stream of consciousness
9 testimony from the beginning of the afternoon to this moment,
10 so I think your objection's too late. We'll hear what he has
11 to say.

12 A. It was very clear. I know what I meant. I know what I
13 said. I know the context of it, following the meeting which I
14 told them we had to reconcile and we couldn't express a view,
15 it was like, you know, I don't even know what's fully going on,
16 you're Harvey Miller and I'm not, and if you're comfortable
17 moving forward, if it's okay with you it's okay with me. I
18 mean, the last thing I was going to do as the investment banker
19 in the deal was tell Harvey Miller that he had to get court
20 approval about a transaction that we weren't even consenting
21 to. Right? So I mean, you have to understand the context. I
22 stood there for a few minutes and I said, "You know, we're
23 going to go." And he had no objection to us leaving.

24 Q. And what time, approximately, was this?

25 A. You know, it's -- I've tried to be clear when I have a

1 firm recollection and when I don't. This is somewhere between
2 3 and 4:30 in the morning.

3 Q. This is Monday morning then?

4 A. Monday morning.

5 Q. Okay. So after you left early Monday morning did you try
6 to take any efforts to update the committee about what you had
7 learned over the weekend?

8 A. We had a big day Monday and I tried to get a few hours of
9 sleep and get to the office early. And I wrote a memo to the
10 committee about what had happened on Sunday.

11 Q. Okay.

12 MR. KIRPALANI: Can we take a look at Movants' Exhibit
13 713?

14 Q. If you turn to the second page of this e-mail.

15 A. Okay.

16 Q. I'm looking at the page, it's page 2 on the bottom and on
17 the top it says, "Per Luke's instructions, please forward this
18 e-mail to the committee. When forwarding please keep in mind
19 that it has an attachment." And it's entitled "To committee of
20 Lehman unsecured creditors from Saul Burian." Mr. Burian, is
21 this the e-mail update or the memo that you were referring to?

22 A. Yeah, I wanted to be clear. I didn't want things to go
23 from me to counsel to the committee and then have a whole
24 committee call generate to a telephone exercise, so I typed out
25 these notes in a memo to the committee and asked -- I believe

1 it was Mr. O'Donnell at Milbank to forward it, you know,
2 verbatim to the committee.

3 Q. Okay. Is the most contemporaneous and comprehensive notes
4 that you have of the events?

5 A. Other than the manila folder it's the only notes I have.

6 Q. Okay. I'd like to focus your attention in the first
7 paragraph, it looks like the third sentence that starts,
8 "Following our committee call" and then all the way to the end
9 of that paragraph.

10 MR. BOIES: Objection, Your Honor. The document's not
11 in evidence. We do have an objection to the document. If he's
12 going to start reading from the document I think we ought to
13 address the objection to the document.

14 THE COURT: Well, we've established that Mr. Burian is
15 on the stand and he's confirmed that these are his reasonably
16 contemporaneous statements to his client. I have no problem
17 with hearing a question that includes a reference to the
18 document even if the document is not in evidence. And in fact,
19 I believe that this witness could say all these things. So I'm
20 going to overrule the objection but the document is not in
21 evidence unless and until there's a motion to admit it, and if
22 an objection is raised I overrule it. Right now it's just a
23 piece of paper that Mr. Burian has identified as his.

24 BY MR. KIRPALANI:

25 Q. Mr. Burian, if you could take a look again at the last two

1 sentences of your memo to the official creditors' committee,
2 and if you could just read those two sentences out for the
3 Court?

4 A. "Following our committee call and the resolution of the
5 multibillion dollar trading and clearing issues, we
6 participated in discussions/explanations regarding our critical
7 open issues and questions. The resolution was MUCH BETTER THAN
8 WE EXPECTED. Nevertheless, to preserve all rights, we did not
9 'consent'."

10 Q. Mr. Burian, I'm particularly interested in your state of
11 mind at the time. This is several hours after you left Weil
12 Gotshal. It's your memo to your client. And I know you've
13 been asked questions about this in depositions, but what were
14 the critical open issues and questions that you felt the
15 committee was concerned about?

16 A. You'll see them summarized in my memo. There were three
17 critical issues. The committee wanted to understand what was
18 happening with the regulatory accounts, deposits. I think in
19 this courtroom it's now called 15c3 issues. The committee
20 wanted to understand who is getting the residential mortgages.
21 The concern was it may be thrown in as a freebie to Barclays.
22 And was there or was there not a five billion dollar issue
23 which was the disconnect between the old and cold schedule we
24 had received, our analysis that some of these assets had gone
25 up, some had gone down, but net/net those we were able to value

1 were worth more, and you know, what Barclays was taking in
2 that. And those were the three critical issues the committee
3 wanted an update on.

4 Q. Okay.

5 A. Or that was my understanding of the three critical issues
6 I was supposed to report to my client about.

7 Q. Okay. I think we've already covered the resolution of the
8 regulatory accounts and the resis. If we could just highlight
9 paragraph 3, and in particular the phrase, "There is no five
10 billion dollar issues". What did you mean by that?

11 A. Ignoring the grammar, the typo mistake. Basically we laid
12 out to the committee at the call, the last call as we had, you
13 know, we had done the analysis that I described to the judge,
14 to the Court here. You know, we could not reconcile this draft
15 schedule or this list of assets to any closing, that we were
16 never given any information, that there appears to be a five
17 billion dollar disconnect between the two, and you know, I
18 repeated the representations I got from Barclays and from
19 Lehman that in fact there was no five billion dollar issue,
20 that the assets were worth forty-four to forty-five billion,
21 and if anything they were being rounded up in value as opposed
22 to being rounded down.

23 Q. Okay. Now, if we can just take a look at the second to
24 last paragraph, starting bottom line, "Netting appears to the
25 following". Could you just read this out also for the Court?

1 A. Yeah, I mean, the other paragraph I described the plumbing
2 and then I said, "Bottom line, netting appears to be the
3 following" -- "appears to the following" -- sorry for the typo,
4 I had not gotten much sleep. "The total purchase assets were
5 booked at approximately 49.4 billion but dropped in value to
6 about 44 to 45 billion. Barclays was then given an additional
7 assets of 1.9 billion to be included in the deal (prior to the
8 Friday hearing). As noted earlier, the 8.55 billion coming
9 from the JPMorgan is included in these numbers, all in
10 approximate value of 47 billion. They are forgiving the Fed
11 loan of 45.5 billion and assuming liabilities of 4.25 billion
12 for a total of 49 plus billion dollars. Depending on how they
13 do liquidating the book they will make or lose money."

14 Q. Okay. And what did you mean by "Depending on how they do
15 liquidating they will make or lose money"? Why did you think
16 that was important to tell the committee?

17 A. You know, there were a lot of conversations with the
18 committee about the fact that there was no longer a purchase
19 price adjustment in the deal. And I was pointing out again,
20 you know, the benefit of the bargain, what we're doing, you
21 know, we're selling these assets -- or, you know, good faith,
22 going concern, marked value, in a way that any other
23 broker/dealer would. And you may not like the fact that today
24 it has the value that it's got but we're avoiding the
25 liquidation, which is the upside, by doing this transaction,

1 but don't come back and complain to Houlihan if these things go
2 up in value or go down in value. I was being defensive a
3 little bit that it is what it is and they'll make money or
4 they'll lost money. It's not -- that is what the deal is.

5 Q. Okay. And the last thing with this document is just if
6 you can focus on the last paragraph there. This is your
7 closing remarks to your client summarizing the closing weekend.
8 Could you just read that out as well?

9 A. I said, "We did NOT" -- all caps -- "NOT consent. We
10 said" -- italics -- "we understand" -- stop italics" -- "what
11 they are telling us and expect to see computer runs of all
12 transfers at some point in connection with the closing
13 documentation. If this is a deal, sounds consistent with the
14 court proceeding. If it is not what actually happens they'll
15 be hearing from us or from the LBI estate. All in all, a very
16 good result."

17 Q. Okay.

18 MR. KIRPALANI: Your Honor, I would like to seek to
19 move this document into evidence.

20 THE COURT: Is there an objection?

21 MR. BOIES: Yes, there is, Your Honor. I also, in
22 addition to the hearsay objection, I'm not sure this is a
23 complete document. This does not bear a Bates stamp. There is
24 a document that has been produced previously that does bear a
25 Bates stamp that has additional pages to it. So I'm not even

1 sure that this is the complete document.

2 THE COURT: Okay.

3 MR. BOIES: But that is a secondary objection to
4 our --

5 THE COURT: Well, if it's not a complete document I'm
6 sure that can be cured with a substitute version of the
7 document. But I do have a question about the timing of
8 production. Is this one of the documents that was produced as
9 a result of the granting of the Barclays motion last week?

10 MR. BOIES: That is our understanding, Your Honor.

11 MR. KIRPALANI: Yes, it is, Your Honor.

12 THE COURT: I understand the hearsay objection which I
13 think is of limited value in connection with the document where
14 the author of the document is on the stand and everything that
15 he has written in the document is subject to cross-examination.
16 Furthermore, the principal reason that Barclays was successful
17 in this aspect of its discovery motion, albeit a motion that
18 was brought very late in the day, literally on the eve of
19 trial, is that I was as interested as Barclays was in knowing
20 what the committee saw. That's a theme of the committee's
21 case. This is exactly what the committee saw. This is Mr.
22 Burian's memo to the members of the committee. It's clearly
23 something that for our purposes is highly probative of what the
24 committee knew at the time because the committee can only
25 function, as we discussed earlier, through its retained

1 advisors. Whether or not it's true is irrelevant. And for
2 that reason I think the hearsay objection is not well taken.
3 What is relevant is what Mr. Burian believed to be true and
4 what he told the committee members at the time. It goes to his
5 state of mind and it goes to the state of mind of the
6 committee. And I think for that reason, despite Mr. Boies'
7 shake of the head, that I'm going to admit it.

8 MR. BOIES: The shake of the head, Your Honor, relates
9 only to whether it's being admitted for the truth of the matter
10 asserted.

11 THE COURT: I didn't say it was being admitted for the
12 truth of the matter asserted and I can't believe that it's
13 being offered for the truth of the matter asserted.

14 MR. KIRPALANI: I attempted to elicit exactly -- it's
15 his state of mind that I was asking about.

16 THE COURT: Exactly. And indeed, it's an operative
17 document that was not only created more or less
18 contemporaneously, but it's entirely consistent with the oral
19 testimony of Mr. Burian.

20 MR. BOIES: I agree with that, Your Honor. I agree
21 with that completely. If it's coming in only for state of
22 mind, I've tried to make clear that the hearsay objection only
23 goes to something that's being admitted for the truth of the
24 matter asserted and that when they're only offering it for
25 state of mind I have not objected to it coming in as state of

1 mind. I was objecting because it was being offered without any
2 limitation. That's the only point I'm making.

3 MR. KIRPALANI: My mistake. It's being offered for a
4 state of mind.

5 THE COURT: Okay. In that case it's admitted.
6 (Movants' Exhibit 713, e-mail to Lehman creditors' committee
7 from Saul Burian, was hereby received into evidence as of this
8 date.)

9 MR. KIRPALANI: Thank you, Your Honor.

10 Thank you, Mr. Boies.

11 BY MR. KIRPALANI:

12 Q. Let's turn your attention, Mr. Burian, to after the
13 closing, after the committee memo that you wrote, did there
14 come a time where Houlihan received updated schedules to help
15 you reconcile what assets had been transferred?

16 A. Yes.

17 Q. Okay. I'd like you to look at Movants' Exhibit 394.

18 MR. KIRPALANI: If we can look at the second page
19 there -- it may be the third page -- third page. If you can
20 blow that up.

21 Q. This, again, is the summary of a ream of paper that
22 follows this exhibit. Are these the schedules that Houlihan
23 received?

24 A. I don't remember exactly when, either Wednesday or
25 Thursday after the closing, after requests to get schedule A

1 assets, the schedule B assets -- schedule A being the repo
2 collateral and schedule B being the 1.9 billion of additional
3 box assets. This came across from Weil Gotshal.

4 Q. Okay. And --

5 A. Well, it came to me from Milbank. It came across.

6 Q. Right, and just for the record and for the sake of
7 completeness, if you look at the first page, I think it
8 indicated how it was transmitted. It looks like an e-mail from
9 Mr. Murgio at Weil Gotshal to Bob Moore at Milbank, and then
10 your understanding that you subsequently received it?

11 A. Correct.

12 Q. Okay. And did Houlihan do any analysis of the September
13 25th schedules?

14 A. We opened it. We were surprised to see that it was
15 identical in every respect to what we had been given on Sunday
16 which was told old and cold and wrong and all that stuff. And
17 we were told by Milbank that Weil had said it was still being
18 updated and reconciled and we put it aside.

19 Q. Did you expect to see that the market values would be
20 updated in this schedule when you finally received it?

21 A. Not updated. I would have -- what we expected to see was
22 a simple list of all the assets that Barclays was getting with
23 the marks at which they were transferred.

24 Q. Um-hum.

25 A. I mean, not that complicated.

1 Q. Did this document satisfy that request?

2 A. No.

3 Q. Okay. Turning your attention now to the clearly post-
4 closing period from and after the closing, during the months of
5 September up through early October, did Houlihan attempt to
6 obtain a reconciliation from Lehman?

7 A. During the periods of time we attempted to follow up to
8 reconcile the closing and get, you know, a closing statement,
9 you know, balance sheet, you know, what happened and what
10 didn't happen, and made that request, for the most part,
11 through Milbank.

12 Q. And do you have an understanding as to whether the Lehman
13 estates had physical access to those records?

14 A. You asked me a relatively narrow period of time.

15 Q. You can extend it to move this along if it helps in
16 explaining the situation.

17 A. I think of this in time periods of closing through
18 December --

19 Q. Okay.

20 A. -- and then December to March or April. During the first
21 period of time, it became clear that Lehman's eyes were shut by
22 Barclays' control of all their system and there were
23 significant issues and squabbles regarding the TSA and a
24 complete inability -- not a complete, that may be too much --
25 major issues concerning the ability to access systems, get

1 information, and operate the remaining Lehman business and we
2 made the request, made the request, but ultimately were not
3 able to get them.

4 Q. Okay. I'd like to ask you to take a look at Movants'
5 Exhibit 712. This is the Alvarez & Marsal that I think the
6 Court has seen quite a bit of.

7 MR. KIRPALANI: We'll put it on the screen.

8 Q. And if you could turn to page 28 of that document or you
9 can look on the screen there. Okay.

10 MR. KIRPALANI: I'd like you to highlight the first
11 sub-bullet, forty-three billion -- actually make it that whole
12 assets purchased down through those bullets there, yeah.

13 Q. Have you seen this document before?

14 A. I have. I was there when it was handed out to the
15 committee.

16 Q. Okay. And what was the purpose of that October 8th
17 meeting with Lehman?

18 A. Does the Court have the whole --

19 Q. Yes.

20 A. -- document?

21 Q. Yes. You want to turn back to a page?

22 A. No, no --

23 Q. Okay.

24 A. -- I think if you look at that whole document it gives an
25 impression -- or it gives an accurate impression of just how

1 much was going on at the time and the issues that Lehman,
2 Alvarez & Marsal, and the committee and its professionals were
3 grappling with at the time. And this was intended to be a
4 summary of where things stand, to reset the clock and then try
5 to be productive going forward, to figure out what we can --
6 you know, what has to happen and, you know, what the next steps
7 are in the case.

8 Q. Let me just stop you there. What was A&M's role, if any,
9 in the Barclays sale?

10 A. To the best of my knowledge, none.

11 Q. None. So I'm sorry, I interrupted you, you were saying --

12 A. Actually -- actually, you can stand up now and say hearsay
13 if you like, my understanding is that at some point we
14 consulted Bryan Marsal -- we, the committee, the debtor, there
15 was some consultation with him about negotiating the TSA and
16 trying to get a feel for operating the business on a go-forward
17 basis. I don't know the extent of those conversations but
18 outside the TSA discussions, my understanding is none.

19 Q. Okay. So just taking a look at --

20 MR. BOIES: May I assume this is all for state of
21 mind, Your Honor?

22 THE COURT: I'm not sure -- I think it's an aside of
23 the witness attempting to be as complete as possible in
24 response to the question that was before him. So it's his
25 state of mind, and as a minor qualification of the assertion

1 that A&M had little to do or nothing to do with the sale.

2 Q. Okay. I mean, I can ask another question just to complete
3 that. You were present during the entire closing, correct?

4 A. No.

5 Q. Okay. Well, you were present -- during the time that you
6 were present at the closing, were representatives of Alvarez &
7 Marsal intimately involved in that?

8 A. I never had any substantive interaction with Alvarez &
9 Marsal on the Barclays purchase of these assets until after the
10 closing.

11 Q. Okay. And so when you saw this slide presented by Alvarez
12 & Marsal, what was your understanding as to the basis of their
13 knowledge?

14 A. When I first saw this slide I didn't have any
15 understanding.

16 Q. Okay. I'd like to direct your attention to the first sub-
17 bullet. It says 43.1 billion dollar repo assets, book value
18 per Lehman stale marks, negotiated a five billion dollar
19 reduction . Do you recall seeing that during the meeting?

20 A. I do.

21 Q. And what was your reaction to it?

22 A. Confusion and concern.

23 Q. Okay. Staying with the first part, 43.1 billion repo
24 assets, was it your understanding that that was net of the
25 seven billion of cash?

1 A. I wasn't sure, but I suspected as much.

2 Q. Okay. And the book value per Lehman stale marks, what was
3 your reaction to that?

4 A. Well, to the extent the 43.1 meant 43.1 plus seven billion
5 was fifty billion, which is what -- you know, my conversation
6 with Mr. Klein was about, then the rest of that comment made
7 sense, but I wasn't sure.

8 Q. And what about the last phrase, negotiated a five billion
9 dollar reduction?

10 A. Again, I didn't know what that meant. If it was an
11 inarticulate use of words, have meant something nefarious, it
12 was I can do the math of fifty billion less five billion is
13 forty-five billion. So, yes, I see a reduction of five
14 billion. I didn't know what negotiated meant in that context,
15 other than people reasonably should be discussing how to
16 properly mark a book consistent with the way a broker-dealer
17 would. And Mr. Klein had told me forty-four to forty-five, you
18 round it up to forty-five. But I just wasn't sure, it was a
19 compilation of bunch of things, and I wasn't sure.

20 Q. Did you do anything after seeing this slide, after getting
21 this presentation? Did you do anything in respect of trying to
22 get to the bottom of these issues?

23 A. Again, during -- after the closing through this -- getting
24 this presentation we never stopped the asking for the
25 reconciliation. When we got this we raised the issue again to

1 Brian and his team that we needed to get a reconciliation. In
2 the committee meeting subsequent to this, the way the committee
3 works, Your Honor, is very often will have updates with Lehman
4 personnel and Alvarez & Marsal personnel and after they leave
5 continue to have discussions, we reminded the committee that
6 this had to be an issue to be looked into, and the committee
7 reminded us they were expecting us to write a report and move
8 on and get the reconciliation. And then a flurry of activity
9 was set off because, you know, Milbank was doing a lot of
10 things at the time. They asked us to make sure they were fully
11 educated and exactly what they were supposed to ask for again.
12 You know, to make sure they were getting what we needed.

13 Q. Okay. I want to take you back a little bit to the week
14 following the closing.

15 MR. KIRPALANI: If we can put up Movants' Trial
16 Exhibit 707.

17 Q. If you can take a look at 707, Mr. Burian.

18 A. I've been following you on the screen, if I can
19 continue --

20 Q. Yeah, yeah, sure.

21 MR. KIRPALANI: And can we just blow up the actual e-
22 mails, we don't need the IRS circular.

23 Thanks. Great.

24 Q. I recognize that you are not cc'd on this e-mail, Mr.
25 Burian. However, your partner is sending an e-mail to my

1 former partner. This is a -- I'll represent to you this is
2 another one of the privileged documents that we produced to
3 Barclays at the Court's direction. And the e-mail starts from
4 Mr. Despins to Mr. Geer and Mr. Fazio, indicates, "That we just
5 received these revised schedules, did Houlihan get them?" And
6 the last sentence says, "They should be audited now. Because
7 if there is an issue with them we need to speak up now before
8 the trail gets cold." Mr. Despins will be here tomorrow and he
9 can explain what he meant by that, I'm not going to ask you
10 about that. But with respect to the top part, if you can take
11 a look at Mr. Geer's summary back to Mr. Despins, is that
12 consistent with your understanding of what you knew at the
13 time, from the closing?

14 A. Yeah. I mean, it's not written beautifully, but I --
15 yeah, Mr. Geer is updating Luc and telling him the schedule
16 we'd got is the same schedule and we've -- were told that there
17 were decreases in value, we couldn't verify it because while we
18 were able to look at net went up in value and they told us
19 "that although the details in Schedule A total to access is
20 really not worth why in the aggregate."

21 Q. Okay. There are two clauses or two phrases in Mr. Geer's
22 e-mail that I want to ask you about because it relates to
23 something that you just talked about as well. The first is in
24 the second line, "The amount that was agreed to between Lehman
25 and Barclays," you see that?

1 A. Yes.

2 Q. Okay. It uses the word agreed between Lehman and
3 Barclays, is that consistent with your understanding of how the
4 amounts were determined?

5 A. Yeah, I know there's been a whole hullabaloo about what
6 the word negotiated means, but, yeah, I mean, they had to
7 get -- what we thought at the time was someone had to pick a
8 number as to the appropriate mark to market for broker-dealer.
9 And as Mr. Klein said to me it was somewhere between forty-four
10 and forty-five billion, and they agreed to use forty-five
11 billion.

12 Q. Okay. And two lines down from that the phrase "the
13 negotiated mark in the deal" is there, same answer?

14 A. Same answer.

15 Q. Okay. I'd like to turn your attention to another one of
16 those privileged documents. It's Exhibit 709. Once again -- I
17 mean you're really here as the representative of Houlihan and
18 the committee's financial advisor, although you're not on the
19 cover e-mail, which is from your partner Brad Geer to a Milbank
20 corporate partner, Crayton Bell, and your other partner Michael
21 Fazio, this is an update that was drafted by Houlihan it
22 appears on October 10th two days after the Alvarez & Marsal
23 presentation. If you could turn to the third page of this
24 document, it's entitled LBI sale value of assets transferred to
25 Barclays. And just -- what's your understanding as to why

1 Houlihan was preparing this document from Milbank?

2 A. Coming out of the committee meeting and having promised we
3 would get to the bottom of what happened or didn't happen, you
4 know, it seems to be a flurry of activity between people on the
5 deal to better educate Milbank about what our suspicions were
6 and what our concerns were. So they can better represent us in
7 dealing with Weil Gotshal at the time. As you know, everything
8 changed. You got involved and Jones Day got involved. But at
9 the time we were dealing with Milbank, you know, telling them
10 what our concerns were.

11 Q. Okay. And if you look at the next page which --

12 MR. KIRPALANI: Can we blow up just the text a little
13 bit so it's legible. Great.

14 Q. If you can look at the first paragraph there it states,
15 "The night of the close of the transaction we told Lehman/Weil
16 that the pieces of the transaction that were being described to
17 us added up to fifty-two to fifty-three billion, rather than
18 the approximately forty-seven billion that had been described
19 in Court the Friday before." Is that consistent with your
20 understanding?

21 A. It's exactly what I said earlier. If you look at the
22 assets -- it's a little exaggerated because we couldn't say
23 with specificity fifty-two to fifty-three because we couldn't
24 value a large slug of these assets. But expressing our concern
25 that what we could value is more not less. And, therefore, is

1 you look at the -- you take that schedule at fifty billion,
2 plus the 1.9 billion of additional assets that's fifty-two to
3 fifty-three billion, you know, were confused.

4 Q. Okay. And in the next paragraph --

5 MR. KIRPALANI: You can shrink that back.

6 Q. If I could just ask you to take a look at the next
7 paragraph. "A few hours after we raised the issue Lehman came
8 and got us and sat down to try and show us how things added up.
9 We were told that some of the marks shown on Schedule A were
10 'out of date' and that the parties, Lehman and Barclays, had
11 agreed to a five billion dollar discount as the appropriate
12 mark to market adjustment for the securities." Is that also
13 consistent with your understanding?

14 A. Yeah, that's a layman's summary of what happened in the
15 Klein meeting, that he got from either me and Fazio.

16 Q. Okay.

17 A. Me and Michael Fazio.

18 Q. Okay. Rather than belabor the entire document, I'm sure
19 you'd be asked about this on cross-examination. Why don't we
20 just move down two/three paragraphs. That's the paragraph that
21 starts "additionally." I want you to look at the second
22 sentence there. I'll read it out for the record. "The story
23 that we were given the night of the close that some of the
24 marks on Schedule A were out of date and needed to be written
25 down, five billion dollars is implausible," do you see that

1 language?

2 A. I do.

3 Q. Had Houlihan reached that conclusion as of October 10th,
4 2008 that the story you were given was implausible?

5 A. Mr. Geer's referring to the fact that based on the assets
6 we could value, if, in fact, these were the corpus of assets
7 that were transferred you would need a very, very large
8 discount, over -- you would need -- you know, to value the
9 remaining privates at sixty to sixty-five percent to get to
10 five billion. Now, that could be accurate or not, I personally
11 didn't share Brad's conclusion or thoughts it was implausible
12 because I didn't know, nor did he what the privates were or
13 were not. He's also making the assumption that the Schedule A
14 is what actually was transferred. But, yeah, I mean, is it his
15 view that Schedule A was transferred, this story is not -- may
16 not fully foot. But what I told the committee was that, you
17 know, this -- I'm not sure Barclays even knows what they got
18 yet. And what we need to do is figure out what really happened
19 and reconcile. And I did say it's probably going to be fine.
20 You know, we got to figure it out and see where it is.

21 Q. If at that time, two days after the A&M presentation, your
22 partner was indicating to committee counsel that this story is
23 implausible, why didn't the committee go running into Court
24 with their hair on fire, to use your phrase?

25 A. You have to understand what was going on at the time. And

1 also that no one seemed remotely interested in this other than
2 me, Brad Geer, Michael Fazio and committee members who we had
3 talked to. You have this closing, people feel good about
4 themselves, they saved the world. And you have gadfly saying
5 what really happened. It was viewed as being ministerial, it
6 was viewed as being picayune, and we were exercising ourselves
7 to get firm to demand the information.

8 I personally did not believe that I would sit in a room
9 with Harvey Miller and others and be represented to as to what
10 a transaction of this nature was. And that it would turn out
11 to be not true. I still have trouble reconciling those
12 misrepresentations by Mr. Klein.

13 I believe that in all the confusion, which I was right
14 about, right. I mean, you saw the settlement agreement coming
15 in December, we saw how confused all the transfers were, that
16 someone quickly sent us a schedule that did not reflect what
17 really went over to Barclays, and that our job was to keep it
18 on the radar screen, collect evidence if there was any
19 evidence. Ultimately had some junior person right a report.
20 They would reconcile what Barclays actually got and total it up
21 neatly to 47.4, you know, and move on in life. At this point
22 in time I didn't have, and I did not convey to the committee
23 that I thought there was a -- that we were misrepresented to.
24 Q. Okay. You mentioned the December settlement, I'd like to
25 turn your attention to that. Did there come a time in December

1 of 2008 when Houlihan intensified its records to pursue a
2 reconciliation?

3 A. You know, we went through a very active period. We pushed
4 Milbank to get information. Weil Gotshal pushed back and said
5 leave us alone. We tried to go directly to Alvarez & Marsal,
6 they didn't have the information. So much was going on in the
7 case at that point in time, that reconciliation just wasn't the
8 most important thing. We kept it hot or warm, but didn't push.
9 At some point in my inbox a motion came in, I think it was from
10 Jamie Tecce or someone else, about a JPM settlement with the
11 SIPC trustee, that had to do with the Barclays' closing, and
12 could I review it. And, you know, I put it on the to do list
13 and left it alone.

14 Sometime that next weekend, I finally had time to do it.
15 I started reading that and I actually began to get more
16 concerned than I ever was before. On one hand it confirmed my
17 suspicion that there was enormous confusion as to what Barclays
18 got, what they were getting or when they were getting it. On
19 the other hand, it was just -- the numbers were just all off.

20 Q. Okay. Can you take a look at what's Movants' Trial
21 Exhibit 359.

22 MR. KIRPALANI: And to anticipate Mr. Boies'
23 objection, I'm not using this for the truth of what's asserted
24 in Mr. Burian's declaration, which was filed with the Court in
25 connection with the December settlement, but rather to show

1 what the committee's state of mind was as of December 19th,
2 2008.

3 A. I see --

4 MR. BOIES: That's the date of the declaration?

5 MR. KIRPALANI: That's the date of the declaration.

6 MR. BOIES: On that grounds I have no objection, Your
7 Honor.

8 A. I --

9 MR. KIRPALANI: I'm getting better.

10 A. I see the document.

11 Q. Okay. Is that your signature on page 4, Mr. Burian?

12 A. Could we turn to page 4?

13 Q. Oh, sure. Here we go.

14 A. That is my signature.

15 Q. Okay. And if you could take a look at paragraph 12, right
16 there above your signature. And, again, I'm going to read it
17 just to ask you to confirm that, in fact, your state of mind is
18 consistent with this at that time. "My understanding is that
19 following the closing of the transaction on September 22nd, and
20 on various occasions since then, professionals retained by the
21 creditors' committee have requested from LBHI or its retained
22 professionals final reconciliations of the assets transferred
23 and liabilities assumed in connection with the sale transaction
24 in sufficient detail, so that we can confirm the accuracy of
25 the representations we received that Monday morning. To date,

1 the creditors' committee has not received this information."

2 Do you see that?

3 A. I do.

4 Q. Okay. Were you -- Mr. Burian, were you involved at all in
5 the committee's decision, through my firm, to object to the
6 December settlement?

7 A. I think it was my recommendation.

8 Q. Okay. And why did you make that recommendation?

9 A. As the Court knows, a lot was going on in Lehman and a lot
10 we were working on. And I felt concerned that the
11 reconciliation had fallen through the cracks and just wasn't
12 happening. I was concerned that the numbers weren't adding up.
13 And I was concerned that if we didn't speak we'd be viewed as
14 having not spoken. And that that would be a negative -- I know
15 I'm not using legal phrases, and I apologize, I'm giving you my
16 understanding. I was afraid that if this continued much
17 further we'd now have court documents that directly contradict
18 what the committee acted upon. We were told that that was
19 going to be a problem one day. And I spoke to you and to
20 committee members about the need not to object to the
21 settlement but to try to get to the bottom of what really
22 happened now that it appears several months later people were
23 finally reconciling and getting to the bottom of where the
24 transfers were and what they weren't.

25 Q. And what's your understanding of what happened during the

1 settlement hearing? Did you come to the settlement hearing,
2 actually?

3 A. I did.

4 Q. Okay. And what's your understanding of what happened --
5 or what did you observe happening regarding the committee's
6 limited objection?

7 A. I was satisfied. I know technically the objection was
8 overruled, but practically speaking we got exactly what we
9 wanted.

10 Q. Which was what?

11 A. My understanding is that Judge Peck made two comments at
12 the end of the hearing. One comment was we understand where
13 the committee is and this settlement is not waiving any rights
14 or otherwise affecting any issues the committee may be looking
15 at. And, secondly -- I'm not sure if directing is the right
16 phrase, but strongly suggested that Barclays cooperate with us
17 in satisfying our information requests.

18 Q. Okay.

19 A. And --

20 Q. Did the committee seek to obtain information from Barclays
21 informally?

22 A. This is when I finally started getting really concerned.
23 Because did they go to a meeting, go respond, yes. Did they
24 help us reconcile, no.

25 Q. What was your understanding with respect to the

1 committee's -- you said your understanding. What were some of
2 your efforts in terms of talking to Barclays' professionals to
3 try to get a reconciliation?

4 A. I think we were asked to put our -- directly or indirectly
5 to put our concerns in writing. I remember participating in at
6 least two calls about what we were really trying to get, what
7 we weren't trying to get. I remember being very frustrated on
8 those calls, and, frankly, not really participating much. It
9 was more your firm sparring with -- oh, my, I'm having a senior
10 moment, Cleary -- Lindsee Granfield's firm is Cleary or
11 Cadwalader?

12 Q. Yes, it's Cleary

13 A. Cleary, I'm sorry. With Cleary. I remember being rude at
14 one point and breaking in and saying to Lindsee on the call
15 "will you stop this nonsense, this is not discovery, this is
16 not technical stuff. I just want to write my stupid" -- I was
17 told not to curse on the stand.

18 Q. Stupid's okay.

19 A. "Blankety-blank report and get this over with. Please get
20 for me whoever you can get it from what you got, what it was
21 marked for, what it was done, I'm smart enough to add it up and
22 we can be done." Because there was an enormous amount of back
23 and forth about are we entitled to this? Should this come from
24 the debtor? Should this come from Barclays? Who from
25 Barclays? We're not going to create documents for you, only

1 going to give you documents that already exist. I think
2 someone made the comment well, you're a public companies you
3 had to book these things at some point. You know, just give us
4 the work papers that were booked at, which may have been a
5 stretch to ask for. And I was just -- that is probably a
6 turning point in my mental process. I got off that phone and I
7 said I'm not going to get the information.

8 Q. And do you recall ever having an in-person meeting with
9 Barclays?

10 A. I don't remember before or after these calls. But at one
11 point Brad Geer and I, you and maybe some others from Quinn
12 Emanuel did go over to Boies Schiller and meet with three
13 Barclays' people. And we were given an opportunity to ask
14 questions and get answers.

15 Q. Were these Barclays' people were they the people that were
16 involved in the sale transaction that weekend when you were
17 there?

18 A. None of them were at Weil Gotshal when I was there.

19 Q. Did you feel that they had the ability to answer the
20 questions that you had?

21 A. They were very nice guys. And they clearly were experts
22 in their fields and they clearly were active from the Barclays
23 in the transaction. My memory is not perfect, but one of them
24 I think was in London, was called in to value -- told me, told
25 us, he was called in to figure out how to hedge the book and

1 make sure there weren't losses and to figure out the positions.
2 One was a relatively senior guy in operations whose job it was
3 to figure out what the transfers were and what they weren't.
4 And another guy was also active in trying to analyze what was
5 in, what was not in the fed repo. And, you know, what assets
6 were coming from JPMorgan and Lehman.

7 Q. Following the meeting at Boies Schiller with the three
8 Barclays' executives, did you take it upon yourself to talk to
9 Alvarez & Marsal further about the debtors' need to intervene
10 at some point?

11 A. I believe that meeting ended. We got some information
12 which was an interesting color, we still weren't getting a
13 basic item that I wanted to go hand to a junior person and
14 write a report. And it was sort of frustrating. And we spoke
15 as a committee level, we spoke to Milbank, we spoke to you, we
16 spoke to Alvarez. Weil did not really participate that much at
17 that point in time. I think they had mentioned by then there
18 were conflict issues or something. And we said, you know, the
19 committee thinks its important. It is important to you or it's
20 not important to you. You have to sort of move this forward.
21 It was more exasperation than, you know, conversations. And I
22 wasn't as active then, I sort of stepped away at this point,
23 and the machinery and moved forward. We were active in
24 recommending that special counsel get retained; Jones Day. And
25 after that it was in the lawyers' hands, and not mine.

1 Q. Okay, Mr. Burian, I think we're almost done. If you could
2 just turn back to Exhibit 410, which the one in evidence if I
3 didn't state it, I'd like it to be 410A, that's the original of
4 the manila folder.

5 THE COURT: Do you want this back? I don't want it.

6 MR. KIRPALANI: Okay, we'll give it to Mr. Burian
7 until we're done.

8 Q. Mr. Burian, focusing on the phrase postmark 44 and 45,
9 "Sitting here today do you have an understanding of whether the
10 market value of the securities transferred as of the closing on
11 the Lehman seller's books was, in fact, between forty-four and
12 forty-five billion dollars?"

13 A. My understanding is they were marked higher than that.

14 Q. Did you ever here or advise the committee that there was a
15 block discount of five billion dollars imbedded in the
16 transaction for Barclays?

17 A. Never heard it, never advised the committee that there was
18 one.

19 Q. Mr. Burian, in your view why is the committee here seeking
20 relief from the Court?

21 A. I think we started with this at the beginning of my
22 testimony. And I'm not going to talk about all the technical
23 issues with respect to, you know, all the other assets. But I
24 think from my perspective it's just basic fairness and justice
25 in the sense of, you know, the Judge, the Court, creditors and

1 the creditors' committee were told that there was going to be a
2 transaction and how it was going to be treated. And it now
3 appears not only was that not what happened, but some of the
4 parties never intended that to happen. And that's very
5 disconcerting to me. We're not looking in any, way, shape or
6 form for market upside, we're not looking to take advantage of
7 gaining the system. And, you know, I'm sure someone's going to
8 yell at me when I go off the stand. I'm not even all that --
9 don't care even that much about the mechanics and whether it
10 came through JPM or not, you know, all I want is to know that
11 we got the benefit of the bargain that was promised to us. We
12 sold assets in a manner that was booked as a going concern the
13 way any other broker dealer would have. And that we got
14 liabilities forgiven and assets paid in an equal amount with
15 respect to these assets, you know, keeping in mind that we were
16 told that the cures -- not the cures. We were told that the
17 comp numbers were off the Lehman books. And, frankly, I found
18 out at the oral argument that the comp numbers were written up
19 several days before that Thursday meeting. So to the extent
20 that those are wrong we should get the money back. But, you
21 know, we were told it was going to be a balanced exchange.
22 What I'm hearing about is it just completely wasn't.

23 If after spending all this time and money someone wants to
24 sit me down and show me there was a balanced exchange I'm not
25 sure I would be here.

1 Q. Well, and to that point, Mr. Burian, looking again at the
2 manila folder, if the deal is ultimately shown to be as was
3 represented to you on that folder, would the committee still be
4 seeking relief?

5 A. I know there were all sorts of other issues that I'm not
6 up to speed on in this litigation. I can tell you from a big
7 picture perspective as the committee advisor if we sold at a
8 fair mark of going concern value in a manner consistent with
9 the way a broker dealer as operating as a going concern was
10 marking their books at the time, forty-five billion of assets,
11 plus the 1.9 billion marked the same way, and we were getting
12 an equal or a greater amount of liabilities forgiven or
13 assumed, we wouldn't be here.

14 MR. KIRPALANI: I have nothing further, Your Honor.

15 MR. GAFFEY: No questions from the debtor, Your Honor.

16 MR. MAGUIRE: No questions from the trustee.

17 THE COURT: Mr. Boies, here's the question about
18 process. I need to leave in about twenty minutes. And
19 obviously you want to complete the witness, but I'm guessing
20 we're not going to complete him in twenty minutes.

21 MR. BOIES: That's true, Your Honor.

22 THE COURT: So this is really a question for you. I'm
23 happy to have you start now, I'm also happy to stop and start
24 tomorrow morning. But I don't want to badly affect the
25 schedule.

1 MR. BOIES: Can I just consult with counsel for the
2 other side for a moment?

3 THE COURT: Sure.

4 (Pause)

5 MR. BOIES: Your Honor, I think we're going to try --
6 movants want to try to put Mr. Ricci on tomorrow, and it's very
7 important, obviously, that he get off tomorrow. So I think
8 with the Court's indulgence I will us the twenty minutes just
9 to shorten the amount of time that I need.

10 THE COURT: We can also start early tomorrow.

11 MR. KIRPALANI: And just also for completeness we -- I
12 will let Mr. Despins know that he should not go tomorrow, we
13 will put him at a different phase because Mr. Ricci is deemed
14 to be a more critical witness based on his knowledge.

15 THE COURT: Okay. So the understanding is that we're
16 going to finish with Mr. Burian and then start with and
17 complete Mr. Ricci tomorrow.

18 MR. KIRPALANI: Well, I hope we can complete him
19 tomorrow, Your Honor. I said I have about two -- maybe a
20 little over of two hours of direct for him. But I think if the
21 morning is --

22 MR. BOIES: Your Honor --

23 THE COURT: We're going to schedule the day so we
24 finish Mr. Ricci tomorrow even if we have to stay past the
25 ordinary stopping time.

1 MR. KIRPALANI: That would work.

2 THE COURT: If it means staying to -- I'm used to
3 staying late on Friday nights. If it means staying -- assuming
4 we have reporters willing to stay till 7 o'clock, that's not a
5 problem.

6 MR. KIRPALANI: Thank you, Your Honor.

7 THE COURT: I'm not staying till midnight.

8 CROSS-EXAMINATION

9 BY MR. BOIES:

10 Q. Good afternoon, Mr. Burian. We haven't met but my name is
11 David Boies, and I think you know that I represent Barclays.

12 A. I do.

13 Q. You were asked whether you believe that the marks on the
14 securities that Barclays ultimately got were between forty-four
15 and forty-five billion dollars. And you said you thought they
16 were higher, do you recall that?

17 A. I do.

18 Q. As you now understand it, sitting here today, what was the
19 total market value of the securities that Barclays acquired in
20 the sale transaction?

21 A. I don't know.

22 Q. Approximately?

23 A. I don't know.

24 Q. Approximately, sir?

25 A. Honestly, Mr. Boies, I know that BONY marked these higher,

1 which was a basis of my comment. But we had never -- Houlihan
2 Lokey has never gone through each and every one of the
3 securities nor received a complete list of what Barclays
4 received. So I don't know what the market value was.

5 Q. You understand you're here as a representative of the
6 committee?

7 A. I do.

8 Q. And is it your testimony that today the committee does not
9 have any estimate, even an approximate estimate of what the
10 actual market value was of the securities that Barclays
11 acquired?

12 A. I believe that there were several experts that were
13 retained. I was talking about Houlihan's knowledge, now you're
14 expanding the question to committee. I've not read those
15 reports myself. And so -- I would be venturing a guess as to
16 what they say.

17 Q. You've not read the report yourself, correct?

18 A. I don't even think anyone at Houlihan Lokey has the expert
19 reports with respect to valuation.

20 Q. All I asked is whether you read them yourself. You said
21 no. And no one's ever described to you the results of those
22 reports, that's your testimony?

23 A. Well, it's not what I said but I'll think about the
24 question now. I believe a lawyer for Quinn Emanuel did
25 describe generally one of the reports sometime last week to me.

1 Q. And did that general description include what the
2 estimated market value was of the securities that Barclays
3 acquired in this transaction?

4 A. I may be mixing up the two issues of what BoNY's marks
5 were, as compared to what our expert witness said, or was going
6 to say. But the conversation -- there was a conversation
7 about, you know, what the assets were worth.

8 Q. What the assets were worth. And what were the assets
9 worth, as you understand?

10 A. I'll give you a range because I don't remember exactly.
11 But I think including the cash, somewhere between fifty and
12 fifty-two billion dollars.

13 Q. And it is your testimony that this is what they were worth
14 on September 22nd, 2008?

15 A. Mr. Boies, can we have an understanding that when you say
16 worth --

17 Q. Market value?

18 A. Well, when you say market value that what you mean is they
19 marked to market value in a manner consistent with the way a
20 broker dealer would mark their books to arrive at market value?

21 Q. Well, let me ask you, sir, what is your definition of
22 market value?

23 A. For these purposes my definition is what the duties of a
24 broker-dealer would be at that point in time, which is to
25 derive as a going concern what a reasonable market value would

1 be consistent with the way broker-dealers often do -- always
2 do.

3 Q. Now, you do understand that Lehman Brothers the week of
4 the September 15th was not a going concern, correct? That's a
5 yes or not question.

6 A. No, I don't understand that.

7 Q. You don't understand that. All right. Did you believe
8 that during the week of September 15th, 2008 Lehman Brothers
9 was a going concern? Again, a yes or no question.

10 A. I believe portions were and portions weren't.

11 Q. All right. Was the broker-dealer portion of Lehman
12 Brothers a going concern?

13 A. The idea was -- again, a yes or no. You can give an
14 explanation afterwards. But I would like you to begin with a
15 yes or no.

16 Q. Yes, depending on how you define going concern. I
17 understood that the idea that we were engaged in was to save
18 the broker dealer as a going concern so to continue to service
19 customers and to provide Barclays the benefit of a functioning
20 operating broker-dealer business that would then derive
21 significant profits. So was it those days, was it buying and
22 selling, probably not, but were we engaged in a job to sell the
23 going concern and to protect it, yes. So define the term and
24 I'll answer your question.

25 Q. Let me try to use your terminology. You realize that the

1 broker-dealer was not engaged in the normal broker-dealer
2 operations the week of September 15th, correct?

3 A. Yes.

4 Q. You realize that the broker-dealer was either going to
5 have to engage in the sales transaction or be liquidation,
6 correct?

7 A. I took that on faith from what I was represented, that
8 there was no other buyer to buy as a going concern, and the
9 choices were this or liquidation.

10 Q. Right. And you've never had any reason to question that
11 assumption, have you, sir?

12 A. Correct.

13 Q. Now, what is at as you sit here now the committee's best
14 estimate of what the book value was of the assets that were
15 transferred to Barclays?

16 A. I don't have anything more than what I told you, Mr.
17 Boies. I think that if these truly were the corpus of assets
18 then they were subject to some perhaps marked to market on the
19 illiquid. They'd be worth somewhere between -- you know,
20 somewhere around the fifty billion on the page of the mark I
21 had. The only mark I have is the fifty billion. I just don't
22 know.

23 Q. I need to follow-up on that just a little bit, sir. Did
24 you have an understanding that the securities that were
25 transferred to Barclays were the securities that were

1 identified on the exhibit that your counsel showed you? That
2 big thick document that listed all those securities. Is that
3 what you understood were transferred to Barclays?

4 A. No.

5 Q. You thought those were not transferred to Barclays?

6 A. Also, no. I mean --

7 Q. Let me be sure I've got the right document, sir. Your
8 counsel showed you a document, it's Movants' Exhibit 394, you
9 have that?

10 A. Yes.

11 Q. And this is the document to Milbank from Weil Gotshal
12 dated September 25, 2008, correct?

13 A. Correct.

14 Q. And it purports to give you schedules A and B of the
15 clarification letter, correct?

16 A. It provides us, not necessarily the final or reconciled
17 list of what went over to Barclays, but it's -- you know, it's
18 clear on the face of the document, sir.

19 Q. I'm sorry, what, sir?

20 A. You're asking me is this the doc -- something that was
21 sent to us that shows assets that went to Barclays. And I'm
22 pointing out to you is the e-mail said they were not
23 necessarily the final reconciled lists. And you also have a
24 settlement agreement that walks through in detail about all the
25 problems of transferring securities and what went do or do go.

1 And you have your failure to give me a reconciled list of
2 securities. So if you're asking me do I know if these are the
3 assets that went to Barclays, my answer remains no.

4 Q. My question was did you understand when this was sent to
5 you that it purported to be a list of what went to Barclays,
6 did you understand that, sir?

7 A. When I first read this --

8 Q. That's a yes or no question. You can give an answer --
9 you can give a qualification, but I'd like you to begin with a
10 yes or no answer?

11 A. No.

12 Q. You did not understand that. Did you understand that it
13 purported to be a very close list of what had gone to Barclays?

14 A. Yes.

15 Q. And am I to understand it is your testimony that you do
16 not believe it was a very close list of what went to Barclays,
17 is that correct?

18 A. What I said was I don't know --

19 Q. Yes or no?

20 A. No, that's not correct.

21 Q. Okay. Do you believe that this actually is a very close
22 list of what actually went to Barclays?

23 THE WITNESS: Your Honor, am I allowed to answer yes
24 or no, or do I have to say yes or no?

25 MR. BOIES: No, you can say I don't know.

1 THE COURT: Oh, absolutely. One of the problems, and
2 you're not having been here for some of Mr. Boies' earlier
3 exhibits of his cross-examination skills is that he has in the
4 past asked witnesses to first answer yes or no, and that
5 included I don't know, I never thought about it, things of that
6 sort. All he's really looking for is -- and it's perfectly
7 proper questioning. All he's looking for is an answer to the
8 question which can include an I don't know, followed by
9 whatever explanation you wish to add.

10 THE WITNESS: Okay, so I have three options.

11 MR. BOIES: Exactly. And I apologize. I usually say
12 yes, no, I don't know.

13 THE COURT: You actually have a fourth option which is
14 I never thought about it.

15 MR. BOIES: Exactly. Any one of those four. Let me
16 put the question again.

17 THE WITNESS: Thank you, Your Honor

18 BY MR. BOIES:

19 Q. Did you understand that this Exhibit 394 was actually a
20 very close list of what actually went to Barclays?

21 A. I understood it was purported to be that. I didn't
22 believe it.

23 Q. Okay. And did you have the belief that you've just
24 testified to, which is that this list was not what it purported
25 to be at the time that you received it?

1 A. I don't want to be too hypothetical, Mr. Boies. I had
2 that belief, and I had an analyst open it and tell me what it
3 said. So when I received it I had no believe. But once
4 someone told me what was in it I had the belief -- I did not
5 believe that this list could be accurate.

6 Q. Okay. And when did you have somebody open it and tell you
7 what it was?

8 A. I don't remember exactly. Shortly after it came in.

9 Q. Okay. Shortly after it came in, correct?

10 A. Correct.

11 Q. And did you tell anybody at that time that what Weil
12 Gotshal had sent Milbank Tweed was in your view not what it
13 purported to be?

14 A. We discussed that issue with counsel.

15 Q. Is that a yes, no or I don't know?

16 A. Oh, sorry. Yes.

17 Q. Okay. And I take it that your testimony is that you told
18 counsel that this was not, in your opinion, what it purported
19 to be, correct?

20 A. Yes.

21 Q. Okay.

22 A. We told them that we were -- we'd be surprised if this was
23 the actual list.

24 Q. And you told them that at or about the end of September of
25 2008, correct?

1 A. Yes.

2 Q. Did you ever ask anyone from Barclays for a list of what
3 had actually been delivered to Barclays?

4 A. Yes, because we asked the estate repeatedly for it. And
5 my understanding is that Barclays controlled the information
6 flow to the estate.

7 Q. Let me be sure of what I'm hearing. Did you or Houlihan,
8 or insofar as you know, the committee, ever directly ask
9 Barclays for a list of what Barclays had actually received in
10 the transaction?

11 A. In this timeframe, no.

12 Q. And by in this timeframe you mean what period of time,
13 sir?

14 A. I think your question was in late September.

15 Q. Okay. When was the first time that the committee asked
16 Barclays for a list or identification of the securities that
17 Barclays had actually obtained in the transaction?

18 A. I don't recall exactly when the first time was.

19 Q. Approximately, sir?

20 A. I can tell you that I was involved in those request
21 following the December settlement motion. I don't know if
22 Milbank or someone else may have made those requests earlier.
23 The focus at that time was from the debtor to get a
24 reconciliation. We didn't think -- I didn't participate in
25 discussions directly with Barclays.

1 Q. Okay. And the first effort that you know of, of the
2 committee, to get something directly from Barclays recognizing
3 that there may be something you don't know about -- the first
4 that you know about is after the December hearing, is that
5 correct?

6 A. Probably. I don't know if there was a conversation
7 leading up to the hearing when we filed our objection, but it
8 began in earnest after the judge's direction for cooperation.

9 Q. Okay. At the time that the transaction closed, the
10 morning of September 22nd, did you have an estimate of what the
11 total market value was of the assets Barclays was acquiring,
12 all the assets?

13 A. Are you including just the broker-dealer book, or you're
14 including the goodwill, all the other assets that are listed in
15 the purchase agreement?

16 Q. For this question I'm including all the assets that
17 Barclays was acquiring in the transaction, not merely the
18 broker-dealer book.

19 A. Oh, no, we did not.

20 Q. Did you have any approximate estimate of the total value
21 of all of the assets Barclays was acquiring?

22 A. No.

23 Q. Do you know if anyone tried to make such an estimate?

24 A. We didn't. I don't know what others did.

25 Q. Did you have an estimate as of the time of the closing in

1 September of 2008 of what the total value of the liabilities
2 were that Barclays was taking on or assuming in connection with
3 the transaction?

4 A. Yes.

5 Q. And what was that value?

6 A. What I knew at the time was -- what I thought at the time
7 was 45.5 billion of the repo, which is forgiving the Barclays'
8 loan. And assuming obligations in respect of our compensation
9 for Lehman employees. And having to pay the cure amounts and
10 all contracts that were needed to operate the broker-dealer or
11 otherwise were wanted by Barclays. I also knew that Barclays
12 had assumed liabilities arising -- relating to certain trading
13 obligations, but those issues were more fuzzy. I was not fully
14 briefed on those.

15 Q. And you didn't have any estimate of what those other
16 liabilities were, what you say is the liabilities relating to
17 the assumption of certain trading activities, is that correct?

18 A. Correct.

19 Q. Do you have any approximate estimate of what those
20 liabilities were?

21 A. I -- only what's been said in Court this morning. During
22 the DTC cross-examination, but generally, no.

23 Q. Have you finished your answer?

24 A. No.

25 MR. BOIES: Your Honor, I think we're at a convenient

1 time to break.

2 THE COURT: Fine. Let's do that. And let me just ask
3 a question about the plan for tomorrow. Is it desirable to
4 start just a little bit early in order to make sure that we're
5 able to fit in Mr. Ricci and complete what we need to complete
6 tomorrow.

7 And I'm just going to ask the reporter if 9:15 is a
8 problem? That's fine.

9 The extra fifteen minutes may help. We could also
10 start at 9, but I find that burdensome, personally. I could do
11 it. But if we're going to be starting early and staying late
12 at the end of a two-week uninterrupted trial that for me has
13 also included some other matters, I think it would be, frankly,
14 tough for me, although I'm finding this all fascinating.

15 I also wanted to have time at the end of the day if we
16 could reserve it for a chambers conference discussion. If that
17 doesn't work out because of the need to complete the testimony
18 and it's just too late in the day, and it's time to move on, we
19 could schedule such a conference at the convenience of counsel
20 sometime within the next couple of weeks.

21 MR. BOIES: Thank you, Your Honor.

22 THE COURT: Does that work for everybody? Fine, so
23 I'll see you tomorrow morning at 9:15.

24 MR. BOIES: Thank you, Your Honor.

25 (Whereupon these proceedings were concluded at 5:29 p.m.)

I N D E X

T E S T I M O N Y

WITNESS	EXAM BY	PAGE	LINE
Isaac Montal	Mr. Maguire	8	12
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E X H I B I T S

NO.	DESCRIPTION	ID.	EVID.
M-675	Rules and bylaws and organizational certificate of the DTCC		71
M-410A	Manila folder	151	
M-713	E-mail to Lehman creditors' committee from Saul Burian		172

C E R T I F I C A T I O N

I, Lisa Bar-Leib, certify that the foregoing transcript is a
true and accurate record of the proceedings.

LISA BAR-LEIB

AAERT Certified Electronic Transcriber (CET**D-486)

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